

# Medicine, Law and the State in Imperial Russia



ELISA M. BECKER

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ELISA M. BECKER



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*Tel:* +1-212-547-6932  
*Fax:* +1-646-557-2416  
*E-mail:* mgreenwald@sorosny.org

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*For my parents  
Anna Sytzko Becker  
and  
George A. Becker*



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## Introduction

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*The time when science, legislation, and practice will go  
hand in hand in Russia, one can hope, will arrive soon...*

A.F. Koni, 1866

Medicine and law in Russia were intertwined from their beginnings. The physician's forensic role and the legal system were cut from the same cloth in the early eighteenth century. They were conceived and created as part of the same rationalizing and Westernizing project under Peter the Great. In his Military Statute of 1716, Peter I simultaneously transformed the legal and medical systems, and the relationship between the two. As part of its new system of administration and governance, the autocracy obligated physicians to perform medical functions for the newly created judicial system, marrying the presumed rationality of scientific methods to that of the newly imported inquisitorial procedure.<sup>1</sup> Because it was the official duty of all state physicians to serve the courts, the story of the physician's changing forensic role is at the same time the story of the medical discipline itself in Russia.

Throughout the eighteenth and nineteenth centuries, the physician's services for the legal-administrative system grew in response to social needs, foreign models, and developments in the fields of physiology, pathology, and chemistry. Determining the cause and manner of death in suspicious cases and murder was the physician's earliest forensic obligation. It continued to be his most frequent task throughout the imperial period. In making the physician's participation mandatory in such cases, Peter I formalized a procedure

that had long been in practice on the Continent and, more informally, in Muscovite Russia. The physician was introduced into the criminal process as an extension of the judge's activity, to examine physical traces of crime, including bodies. But forensic medicine gradually encompassed a broader array of questions.<sup>2</sup> Physicians provided conclusions about the nature of external injuries, determined whether an infant was born alive (in infanticide cases), investigated poisoning, examined victims of rape and other attacks, pronounced judgments on "deviant" sexual behavior, and analyzed blood and other bodily stains. In addition, physicians rendered conclusions about the mental condition of criminal offenders, and by extension, shaped a defendant's fate and the broader issue of legal responsibility. The judicial reform of 1864 incorporated this formerly closed-door, administrative function of determining insanity into judicial procedure for the first time; in the same way, the reform introduced *glasnost'* into judicial proceedings, turning the adjudication of insanity into a public matter. The combination of these innovations led contemporaries (lay and specialized alike) to view the insanity/responsibility question as the physician's most important forensic task, and drew the physician's legal role into the social and political debates of the last quarter of the century.

Russian physicians' forensic repertoire mirrored that of their Continental counterparts, with whom they shared a common literature. Where they differed was the social and political significance of the physician-expert in the Russian setting. The forensic role was atypically central to Russian physicians' self-conception and emerging group identity. The "scientific expert" is typically viewed as a trans-national figure, representing—and represented as—the embodiment of neutral expertise in an otherwise contentious or politically charged legal arena. In Russia, the physician-expert himself became politically charged, and represented a competing source of authority under autocratic political culture. Wielding the social authority of science within the reformed legal structure, forensic-medical expertise represented a double threat to an autocracy that was traditionally jealous of both its monopoly on state-administered tutelage and the intrinsic power of the law. This



threat was particularly pronounced in the case of forensic psychiatry. As the medical notions of insanity generally expanded and became more deterministic across the nineteenth century, physicians openly contested autocratic views of criminality and of maintaining social order. This brought physicians into direct conflict with the state's tradition of monopolizing authority. As a result, the physician's forensic role became enmeshed in the political interests surrounding legal reform and involved in multiple social, professional, and political agendas.

The 1864 reform produced a judicial system that was bound to challenge the unrestricted authority of the tsar. The role of professional expertise in the new judicial process was essential to this challenge.<sup>3</sup> The rhetorical and ideological goal of science—"the objective quest for truth," familiar to the educated Russian public by the 1860s—coincided neatly with the statutory-defined goals of reformed judicial procedure. It also overlapped with the practical aims of self-proclaimed modernizers (within and outside government) who attempted to systematize criminal procedure in order to ensure due process while minimizing arbitrary intrusions by the state. Historians of science have argued that the ideology of scientific objectivity offered Russian physicians the opportunity to engage in civic activism without becoming embroiled in the political fray.<sup>4</sup> Thus they have demonstrated that the Russian medical profession encompassed a spectrum of political viewpoints. However, the purported neutrality of scientific ideas and methods, and by extension, the forms of civic intervention such technical expertise could entail, also provided a way for medical practitioners to legitimize their social and political activism.

By tracing the development of forensic-medical practice from its emergence as a state service in the early eighteenth century to its role in transforming the state system by the close of the nineteenth, I seek to analyze how the interaction between state and the occupations of law and medicine shaped processes of reform in contemporary Russia. As part of this development, medical and legal practitioners redefined the physician's role from an administrative *chinovnik* to an ideologically distinct and autonomous rep-

representative of science within the state and public arena. This transition, I argue, introduced a new category of person and independent center of authority in the late nineteenth-century Russian context—the scientific expert. Analyzing the interests and debates that fueled this transition, this study contends that physicians and jurists shared a common professional mission in promoting the role of a value-free, professional ethos as a means of transforming a state that remained politically autocratic and centralized.

It has become a historical commonplace that in the late nineteenth century, under the climate of the “Great Reforms,” Russia inaugurated the modernization of its judicial system and witnessed the emergence of professional groups—and from the conjunction of these transformations (and other elements) an embryonic civic sphere began to take shape, resembling those of politically liberal, capitalist societies.<sup>5</sup> However, historians have not addressed the issue of exactly how these two key transformations linked up in their own time, under a still authoritarian political regime. The implications of this interrelationship cut both ways. How could autocratic Russia develop a rule-of-law system without a professional class that could lay claim to scientifically grounded knowledge? Conversely, how could a professional class develop without a rule-of-law system to ensure and protect the autonomous exercise of disciplinary authority? Meanwhile, scholarship on late imperial Russia has largely obscured the connection between transformations in legal structures and the self-identity of social groups.

This study examines how these processes became linked in the efforts of legal and medical practitioners to expand and secure the authority of the physician in the reformed legal system, in order to improve, rationalize, and protect the new judicial institutions. The desire to enhance their own professional standing—dependent as it was on the success of legality and protection of individual and group rights—led professionals to augment, rather than minimize, the physician’s role and autonomy in the judicial apparatus in order to transform the otherwise arbitrary practices of the legal process along the lines of technical expertise and scientific “rationality.” Forensic physicians, institutionally situated at the nexus

between autocratic politics and the professions of law and medicine, were central to these processes of change. My focus is a diverse group of medical and legal actors—both inside and outside of government—who engaged in debate and dialogue over the physician's role and status within state, particularly judicial, institutions. From the eighteenth century into the nineteenth, there was a mutually reinforcing dynamic between academia and the state that has been heretofore largely ignored, but is nevertheless significant for understanding how disciplinary authority was fashioned, exercised, and refashioned across a period of social and political change. The changing role and significance of the forensic physician provides a window on larger issues of the evolution of professions, notions of legality, the attribution of authority to scientific knowledge, the relationship between trained specialists and legal reform, and the emergence of new, more deterministic views of deviance and human behavior.

## OCCUPATIONAL OUTLOOK

Another primary aim of this book is to look at how occupations that were part of the state bureaucracy differed from their Western counterparts, and developed a different occupational outlook. Their ultimate goal was not autonomy, as found in Western countries, but to carve out a role for themselves within the state, to gain some control of the state.<sup>6</sup> Before there were professional associations, there were state-service roles. However, a study of occupational origins, activities, and interests within state institutions has remained for the most part oddly absent from that of the professions in Russia.<sup>7</sup> This lacuna is particularly true for the Russian medical profession, despite the fact that the majority of physicians worked within the state system throughout the imperial period. In previous accounts, historians have portrayed physicians' forensic tasks as onerous obligations, and obstructions in a

linear course of professionalization that moved away from and in opposition to the state.<sup>8</sup> What then compelled physicians in the reform era not only to pursue their traditional role in judicial institutions but to actively seek to expand and legally secure it?

In seeking to answer this question, this book examines physicians' work in state institutions, and reconsiders how social actors in the autocratic context aspired to authority. Within the political culture of autocracy, physicians' role in the legal system offered a unique mechanism for exercising occupational authority and influence on the social body. Physicians' conclusions were essential to legal judgments under the pre-reform system of inquisitorial procedure, which remained fully intact until 1864, longer than in any other European country. Under this system, physicians' conclusions were deemed "perfect proof"—equal in weight to the more well-known "confession"—and likewise decisive in determining the outcomes of criminal investigations. This influential and elevated administrative role was, however, disproportionate to the group's low social origins and service ranks, the components of formal social status in the Russian Empire. This study suggests that the physician's work in state legal institutions was an important and ongoing source of influence and status for physicians, and fundamentally shaped the group's sense of social, and later, public identity. In making this argument, this study goes beyond traditional frameworks for understanding the development of professional identities, in which historians draw from Western models, relying on factors such as state control or therapeutic efficacy to define the occupation and situate it on the social landscape relative to other social groups.<sup>9</sup>

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INTER-PROFESSIONAL RELATIONS

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Examining the connections between law and medicine places the relationship between professions in a different light. In a vast historical and sociological literature traversing many national settings, professional groups generally have been studied in isolation from one another. Historians of Russia have also adopted this approach, despite the different circumstances under which certain occupations developed in imperial Russia, where they were created to serve the state bureaucracy, rather than originating from separate guilds possessing corporate rights and privileges. Despite this uneasy fit between Western models and the Russian experience, scholars have segregated professional groups into individual case studies of “professionalization.” This focus on individual groups and their “incomplete” professionalization by Western standards has, in turn, been subsumed under and reifies a trajectory leading towards social fragmentation at the end of the Old Regime, making the eventual social breakdown appear inevitable and natural.<sup>10</sup> Historians have emphasized the lack of cohesion between and within social, including professional, groups to explain alternately the failure of the educated public to coalesce into a vital and viable oppositional force, and the failure of liberalism, both of which serve as tributaries into the looming historical question of why the 1917 revolution happened, and more specifically, what its social preconditions if not causes were.<sup>11</sup> Reinforcing venerable historiographical narratives, historians’ focus on isolated professions has become a self-fulfilling prophecy explaining the isolation of social groups. Likewise, the seeds of disintegration and/or opposition have been read backwards into the development of the Russian professions and attributed a formative role in the shaping of group identities.<sup>12</sup>

This telescoping of separate groups in Russian historiography is also reinforced by the timeframe of these studies. Scholars typically take the post-reform period as their starting point, when the familiar indicators of Western-style professional organization appeared. This framework has prevailed despite the fact that

occupations such as medicine forged a sense of occupational identity and intra-occupational relationships within state structures over a century earlier. As this study demonstrates, the close relationship between jurists and physicians developed in post-Petrine Russia from a shared rationalist perspective that intertwined medicine and law at the administrative, practical, procedural, and intellectual levels. The rules that bound judicial and medical practice operated as a single system, as part of the state's broader objective of administering social order—rather than fostering distinct and isolated occupational spheres. Beginning my analysis in the early imperial period, and looking at the interlinking roles of medical and legal officials within the administrative system, I identify sources of cohesion and interdependence between the two groups that help explain post-reform developments when representatives of medicine and law came together in an effort to initiate reform.

Within this close relationship between jurists and physicians, there were key moments when occupational interests diverged. These moments took place in conjunction with and as a response to changing state structures, rather than emulation of the “free professions” in the West, as is commonly depicted in the literature. The transition to the new judicial system in the early 1860s served as an occasion and impetus for physicians to identify collective group interests, and led to a radical break in how physicians conceived of their legal role vis-à-vis jurists. Physicians redefined their role from state bureaucrat to independent “expert” and “specialist,” according to the currency of legal-administrative practices and relationships that shaped their work. In the process, the imported term “expert” assumed a particular significance and utility in relation to the general structure of authority in autocratic Russia. This process of redefinition involved high-ranking medical officials, who participated with legal officials in the drafting of the 1864 judicial reform statutes. It also involved state physicians and medical academics who responded to the impending judicial reform and its implications for their status, which they gleaned from foreign medical literature and study abroad. On the eve of the judicial reform, physicians of various ranks recast their foren-

sic role in accordance with the ideology of science as a new basis for credibility, autonomy, and influence in the reformed system, rather than the state's traditional categories of administrative rank and title. Yet against the forging of separate occupational identities, the perceived partnership between jurists and physicians persisted. As with other "sedimentary" social formations, the "institutional and psychological residue" of the earlier relationship between medicine and law retained considerable social force into the period that followed the Great Reforms.<sup>13</sup>

## PERIODIZATION

The dynamic between physicians and jurists evolved over the course of the imperial period. Tracing this relationship into the reform era forces a re-evaluation of the dominant mode of periodizing imperial Russian history. Much of the historiography posits a break at the Great Reforms and privileges late nineteenth-century developments over earlier ones.<sup>14</sup> In this vein, the judicial reform of 1864 is typically depicted as a radical departure from the past, which has led historians to view all that preceded it as backward, and all that followed as a fresh start. Looking at the continuities in the physician's legal role before and after the reform, I identify a set of common concerns between jurists and physicians that animated post-reform debate over the medical expert's status and the appropriate direction of the judicial reform. In doing so, I suggest that the reception and adaptation of imported judicial institutions was a more complex and broader affair than has been previously considered.

While the reform did introduce unprecedented changes in legal structures and their relationship to the state, old procedural formations and occupational expectations from the pre-reform period endured. Scholars have tended to dismiss the Nicolaevan period (1826–1855) as an era of reaction and impediment to change.<sup>15</sup> However, in several respects, physicians—and their disciplinary

authority—never had it better. In this period, high-ranking medical officials, who also served as professors of forensic medicine, created legislation, medical textbooks, and university curricula based on the latest European models, while reinforcing the physician's elevated and influential status within the administrative-judicial complex. Medical conclusions for the courts were accepted as “certain” and institutionally immune to criticism. The forensic physician was legally designated as the chief of his domain vis-à-vis the legal officials with whom he worked. Aware of the influence they wielded through this system, medical practitioners of the 1840s praised the rationality of inquisitorial procedure over the “arbitrariness” of the imported adversarial system that was being introduced across Europe (and would later arrive in Russia via the judicial reform).

Post-reform developments likewise defy the standard periodization, and stemmed as much from continuities with the past as from the new social and political climate reflected in and unleashed by the Great Reforms. The legislative underpinnings and social dimensions of the physician's pre-reform role shaped the development of professional identities, responses to the judicial reform, and the melding of the two. Professional and political goals dovetailed. Reflecting the growing liberal current within educated society, physicians and jurists sought to protect the new judicial institutions and the inviolable rights these institutions created, upon which their own professional standing depended. In response to increasing public and official discontent with the reformed judicial system, both occupational groups turned to scientific rationalism—and the physician's traditionally expansive authority in the legal system—as a corrective to the reform's shortcomings. Drawing on pre-reform traditions, jurists and physicians proposed an elite solution for working out the tensions of reform, while preserving the beleaguered jury trial, venerated by liberals as a form of popular, political participation and a constitutional institution in embryonic form.<sup>16</sup>



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THE QUESTION OF RUSSIAN MODERNITY

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This book's approach to the question of disciplinary authority and the professions has implications for our understanding of Russian modernity. In both historical and sociological literature the question of professions is deeply embedded in the notion of modernity.<sup>17</sup> In the Russian context, this conflation takes on a broader valence, and is ensconced within the larger historical-political question of the extent to which liberalism, and its social and institutional hallmarks, established a foothold in Russia. Under this rubric, historians' search for professions in Russia has become associated with the search for other "missing" forms on the road to modernity.<sup>18</sup> Within this interpretative framework, Laura Engelstein, in her important evaluation of Michel Foucault in the Russian context, offers a rigorous analysis of the relationship between disciplinary authority and liberal legal institutions.<sup>19</sup> Engelstein argues that the cultural authority that was enjoyed by the "free professions" and scientific disciplines in Western, liberal states did not develop to the same extent in late nineteenth-century Russia, in spite of the penetration of Western ideas and institutional forms. In short, Engelstein links the limits of disciplinary authority in late imperial Russia to the absence of a rule-of-law framework through which the disciplines could operate in autonomous fashion. While illuminating and thought-provoking, Engelstein's study represents a trend in the historiography to focus on how the Russian professional mission "fell short" of an ideal liberal course.

This book fits in with recent scholarship that has begun to step away from the standard picture of Russia's "incomplete" modernization—in whatever guise—and instead considers how historical actors "debated within the terms of modernity, shaping a particular course of development within a comparative European framework."<sup>20</sup> In this regard, my study represents the obverse of Engelstein's thesis. This book demonstrates the processes by which legal, social, and institutional authority was invested in disciplinary, scientific knowledge, and how these processes were linked to the

shaping of a particular vision of legality tailored to Russia's social and political conditions. Identifying the ways in which social actors merged legal reform efforts with their professional objectives, it argues that this interrelationship was productive of a particular occupational perspective and course of reform, rather than an underdeveloped shadow of developments in Western, liberal states.

In advancing this argument, this study also demonstrates that the distance between state and society was not as great as previously depicted in the historiography. Historians have long recognized that a widespread faith in science—in terms of its empirical methods and as an ideology—characterized the period of the “60s.” Historians generally have associated the ideology of science, and its philosophical offshoot scientific materialism, with the so-called alienated *intelligentsia* of the 1860s, who adopted and valorized the methods of science in an oppositional political critique and, eventually, revolutionary ideology. This study shows that reformers operating within the government also invested in this perspective, and sought to employ the empirical methods of science in order to improve and transform the state system, rather than undermine or topple it. Reform-minded medical and legal officials invested the scientific ethos in the reformed judicial institutions and viewed these state structures as the appropriate vehicles for carrying out the social promise of science and its rationalist orientation. Representatives of state and society shared a common intellectual outlook entering the reform period that calls into question the ideological divide that purportedly separated state from society before 1917. Officials, along with academics and practitioners, viewed science and its study of the material conditions of life as vital to the success of the judicial institutions, which, in turn, were integral to the success of a particular liberal vision of Russia's future, rooted in legality.

In the second half of the nineteenth century, the medical expert—a representative of science—stood at the center of intersecting political, social, and professional agendas. Attempts to define and shape the physician's legal role, which often focused on the letter of the law, were more than mere niggling. The question of med-

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ical expertise provided an opportunity for occupational groups to express not only their vision of their professional mission in the new judicial order but to speculate about the construction of legality, the authority of scientific knowledge, and the relationship between trained specialists and the state. By the close of the nineteenth century, Peter I's rationalizing project came full circle. Drawing upon the partnership that Peter created, and the latest medical views of deviance, jurists and physicians found common interest in extending medical expertise more pervasively throughout state institutions in order to rationalize and transform the state system. Paradoxically, this partnership also signaled the emergence of a new social alliance to unseat the state as initiator of reform and guardian of social order. In *fin-de-siècle* Russia, physicians and jurists joined forces in a contest over the power to shape the course of individual lives and the future legal order, in which a central and autonomous role was slated for their own specialized knowledge, professional authority, and a new rational ethos.



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## CHAPTER 1

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# Procedural Immunity: Medical Knowledge in the Age of Legal Certainty

To understand how and why physicians responded to the judicial reform as they did, it is necessary to first examine the expectations and relationships that they brought with them into the reform period from their pre-reform experience. This experience, as I seek to demonstrate in this chapter, was shaped by the physician's rule-bound work and status under the inquisitorial system.

The historical literature, with few exceptions, has often conveyed the impression that the legal personnel who staffed the new courts were the product of the judicial reform.<sup>1</sup> With regard to medical personnel, it was precisely those physicians who received their education and initial experience under Nicholas I who responded most vociferously to the tensions produced by the implementation of the reform. This "crossover" generation of physicians, who engaged in forensic medical activity across the divide of the judicial reform, set the tone for the broader public debates and polemics over expert status that the reform's implementation ignited.<sup>2</sup>

In this chapter, I examine the status of the physician under the pre-reform rules of procedure. In doing so, I argue that the physician's elevated and insulated procedural status under the inquisitorial system shaped physicians' perception of their social role and, included in that, a sense of shared occupational purpose with jurists. To this end, I contend that the physician's procedural status served as the basis for extending this privileged status to the broader institutional level, shaping physicians' sense of centrality

and authority in the administration of justice and fostering a particular relationship with their legal counterparts. All of these elements were central to physicians' response to the 1864 judicial reform (the subject of later chapters). Finally, I suggest that this procedural situation contributed to physicians' sense of their social identity coming into the reform period. In this respect, this legal setting and work experience contributed to the formation of physicians' broader status, beyond and in addition to factors such as low social origins, therapeutic efficacy, or state control, which historians have traditionally relied on to define the occupation and situate it on the social landscape, relative to other occupational groups and the state.<sup>3</sup>

In addressing these issues, this chapter analyzes the conjunction between the two bodies of law governing judicial and medical practice, and the institutional and social implications of this conjunction. To this end, I consider the ways in which the rules governing judicial and medical practice were interlocking and operated as a single regulatory system as part of the state's broader objective of administering social order—rather than fostering separate, distinct, and isolated occupational spheres, as historians of imperial Russia traditionally depict them.<sup>4</sup> Finally, I consider the implications of this interconnection at a social level in terms of the relationship between physicians and legal administrators who served the courts.

The first part of this chapter examines the legal-structural dimensions that shaped the physician's procedural status. This section identifies three main characteristics of the pre-reform system which, I argue, bore directly on the developments discussed above. The first characteristic is the linkage between the bodies of legislation that regulated medicine and law, and by extension, the interconnection between the medical and legal administrative spheres as part of—what was intended to be—a single rational system. The second characteristic is the reproduction and reinforcement of this “joint enterprise” between medicine and law at the level of procedure, again, organized according to an ethos of rationality. The final characteristic is the privileged status of medical

knowledge that resulted from these legislative and procedural arrangements and the rational quest for legal certainty. The second part of this chapter considers the broader institutional and social implications of this procedural status.

## THE BODIES OF LAW

Historians of imperial Russia have up to now considered the bodies of law that regulated jurists and physicians in isolation from one another. Indeed this is reasonable and consistent with the questions that historians have asked of these sources. Historians of Russian law have considered the 1716 Military Statute only in relation to the legal system it established; historians of medicine have likewise looked at medical regulations in isolation and, among Western historians in particular, from the perspective of how these rules constrained the professional development of physicians.<sup>5</sup> While these separate narratives are important, they are not the full story.

When physicians were called to serve the courts, their practice was bound by two sets of rules (legal and medical); as such, they operated at the intersection of two administrative worlds. Medical-administrative rules constituted one set, and the pre-reform rules of legal procedure constituted the other.<sup>6</sup> As Sergei Gromov, the “father” of Russian forensic medicine put it in 1832, “the rules that must guide the physician ... can be divided into general or Legal, and particular or Medical.”<sup>7</sup> Accordingly, the physician was institutionally ensconced in both the judicial and medical administrations. Nothing more clearly exemplifies this dual jurisdiction than the fact that the physician submitted a copy of his forensic documents to both the legal and medical administration.<sup>8</sup>

By extension, the physicians’ legal identity was shaped by both sets of rules simultaneously. As this chapter demonstrates, these

two sets of rules (medical and legal) developed in tandem, and each reinforced the other in terms of the elevated status and significance ascribed to medical knowledge under the pre-reform court system.

### Common Origins

Forensic medicine and the pre-reform inquisitorial system were cut from the same cloth. Indeed, the designation of compulsory medical participation as it relates to the Roman-canonical mode of proof played out across the European continent, and historian Catherine Crawford has observed the basic correlation of the history of medico-legal legislation in Europe with the establishment of inquisitorial procedure.<sup>9</sup> While it is important to situate Russia within these Continental developments, Russia was unique in two respects: first, in terms of its late entry into this Continental trend (two centuries after the last European country, Germany);<sup>10</sup> and second, more significantly, both elements (inquisitorial procedure and compulsory medical obligation) were born in one fell swoop in Russia, and conceived as part of the same rationalizing impulse and Westernizing project.

In Russia this common “cloth” was Peter the Great’s Military Statute of 1716.<sup>11</sup> By way of this Statute, Peter simultaneously transformed the legal system, the system of medicine, and the relationship between the two.<sup>12</sup> The Military Articles, which comprised the second part of the Military Statute, introduced the rules governing the courts, as well as the rules of inquisitorial procedure under the heading “Military Process,” based on the Roman-canonical model.<sup>13</sup> (There was no distinction at this time between civil and criminal procedure.) Specifically, inquisitorial procedure was set out in this section under the rubric of “Short presentation of trials.”<sup>14</sup> Historians have amply documented the foreign sources of this legislation, and the fact that Peter borrowed the statutes from Swedish, Danish, and German military codes.<sup>15</sup> One of the foremost students of Peter’s reign has concluded that his borrowing fell somewhere between direct copy and complete original, and was a compilation of many foreign sources.<sup>16</sup> At the same



time, these Articles were the birthplace of Russian medicine as state service and part of the state's administrative apparatus. The Articles defined the medical practitioner as subject to the sole jurisdiction of the state, turning all physicians into state officials.<sup>17</sup> As part of their new state service, it was the duty of all physicians (then generically referred to as *lekari*), to serve the newly created court system.

In the Military Articles, one finds two main points of intersection between the legal and medical spheres. The first point is the designation of compulsory medical participation in court cases (under particular circumstances). This designation appeared in the form of Article 154, which made autopsies obligatory in all cases where violent death was suspected.<sup>18</sup> While the physician's initial participation was restricted to forensic dissections pertaining to cause of death, the scope of the physician's forensic duties and activities broadened via an accretion of legislation throughout the eighteenth and nineteenth centuries.<sup>19</sup>

Peter I formalized physicians' participation in the legal process, but, as Russian and Soviet historians have shown, the transition to and inclusion of physicians began earlier, if unevenly. Nineteenth-century Russian and Soviet historians of medicine point to a smattering of such cases in the 1500s and 1600s.<sup>20</sup> By these accounts, physicians participated in cases of poisoning, injuries, simulation, and violent death, to name a few. The institution responsible for these examinations was the Apothecary Chancery (*Aptekarskii prikaz*, instituted in the sixteenth century), which was also responsible for official examinations regarding fitness to carry out state and military service, medical violations, and other.<sup>21</sup> As S.V. Shershavkin, the leading Soviet historian of forensic medicine, attests, "in this way, medical *ekspertiza* [expert examination] was used in the capacity of judicial evidence long before the Petrine reform."<sup>22</sup> Although many Russian historians of medicine cite such cases from the early modern period, the consensus among them is that such examinations for legal purposes were isolated and casual.<sup>23</sup> Only under Peter's 1714 Military Articles did Russian physicians enter the process in mandatory fashion under the newly introduced inquisitorial system.

Examples from early eighteenth-century practice illustrate the integration of forensic-medical duties into the hierarchical structure of Peter's new service state. After Peter's Military Statute—but before the 1797 institution of the city and district physicians, to whom forensic tasks were assigned—the function was divided up and farmed out according to a hierarchical and intellectual division of labor. The first line of activity, conducted by physicians of lower rank, was that of the sensory organs, or “skilled viewing.” The formulation of an “opinion” was done by physicians of top rank. According to Russian historian of medicine Ia.A. Chistovich, two cases from 1739 show that the physician who conducted the dissection, was limited by the description of that which was “found” during the dissection, but no kind of “opinion” was stated; this “description” was sent to the *shtadt-fizik* (city-physician, the highest medical service post), who was not present during the dissection, but nevertheless wrote his opinion about the cause of death, basing it only on the description of the physician who conducted the dissection. This “opinion,” finally, was not given to the court; instead what was given was only a short excerpt from it, submitted in the name of the Medical Chancellery (*Meditinskaia Kantseliaria*, the state's top medical bureau at the time, and a precursor to the Medical Council) along with the original description of the dissection.<sup>24</sup>

But the intertwining of medicine and law was more tightly bound within the Military Articles than Article 154 would suggest. The second point of intersection is found under the rules of inquisitorial procedure contained in the Articles, and in particular, the rules of proof which lay at the heart of inquisitorialism. These rules established the probative weight and status of medicine within the adjudicative process.<sup>25</sup>

As historian Lindsey Hughes has described, it is difficult to separate the topics of justice and law in Peter's Russia from the questions of government and administration.<sup>26</sup> The Military Articles exemplify this conflation. Historians typically explain Peter's introduction of the Military Articles according to a mix of his personality and administrative objectives.<sup>27</sup> To this end, the Articles are generally presented as an example of Peter's desire to apply mili-

tary-style discipline and order universally.<sup>28</sup> This interpretation penetrates historical explanations at more specific levels; while acknowledging that the Military Articles reflected the impact of new directions of legal thinking, the leading historian of Russian law explains Peter's introduction of closed, canonical procedure and proofs under this same umbrella, as an effort "to incorporate" these most recent legal principles "into a generally tightened system of military organization and discipline."<sup>29</sup> On the other hand, in separate histories of medicine, one finds personal interests as the key explanatory factor. In such accounts, it is Peter's "love of medicine" and his "familiarity with natural sciences, anatomy, physiology, and even with practical medicine that afforded [Peter] the opportunity to understand the full importance of those methods, which medicine employs for the discovery of truth in judicial cases."<sup>30</sup> This personal proclivity makes it "not surprising" for these authors "that the introduction of the medical investigation into Russian proceedings [via the Military Statute of 1716] was [Peter's] deed."<sup>31</sup> Not dismissing the relevance of both of these dimensions of Peter's interests and personality, it is important to note that the changes implemented within these two branches of the state system (legal administration and medical service) were not conceived randomly nor in isolation, but as part of and partners within an overriding objective from the start.

Beyond the militarizing intent of the Articles, this legislation, more broadly, fits under Peter the Great's Westernizing enterprise and served to regulate a social-administrative network. Within this network, law and medicine were introduced in tandem, within the same impulse and intent, and conceived to serve jointly under Peter's overriding project to establish order (*poriadok*), which included the concept of orderly and consistent regulations as well as lawful obedience.<sup>32</sup> Conjoined with and encompassing this objective, Peter's reform project above all represented the introduction of a "rational" system, in which the rational principle undergirded and justified both the mechanics of adjudication and the inclusion of physicians within that system. As historian Evgenii Anisimov has described, the epoch of rationalism of the European seventeenth century was one of the major intellectual influences on

Peter and his reform.<sup>33</sup> With the introduction of the Military Statutes, Peter brought to Russia a legal system founded on an ethos of logic and rationality, in which medical knowledge was destined to play a central role.

### The Medical Regulations

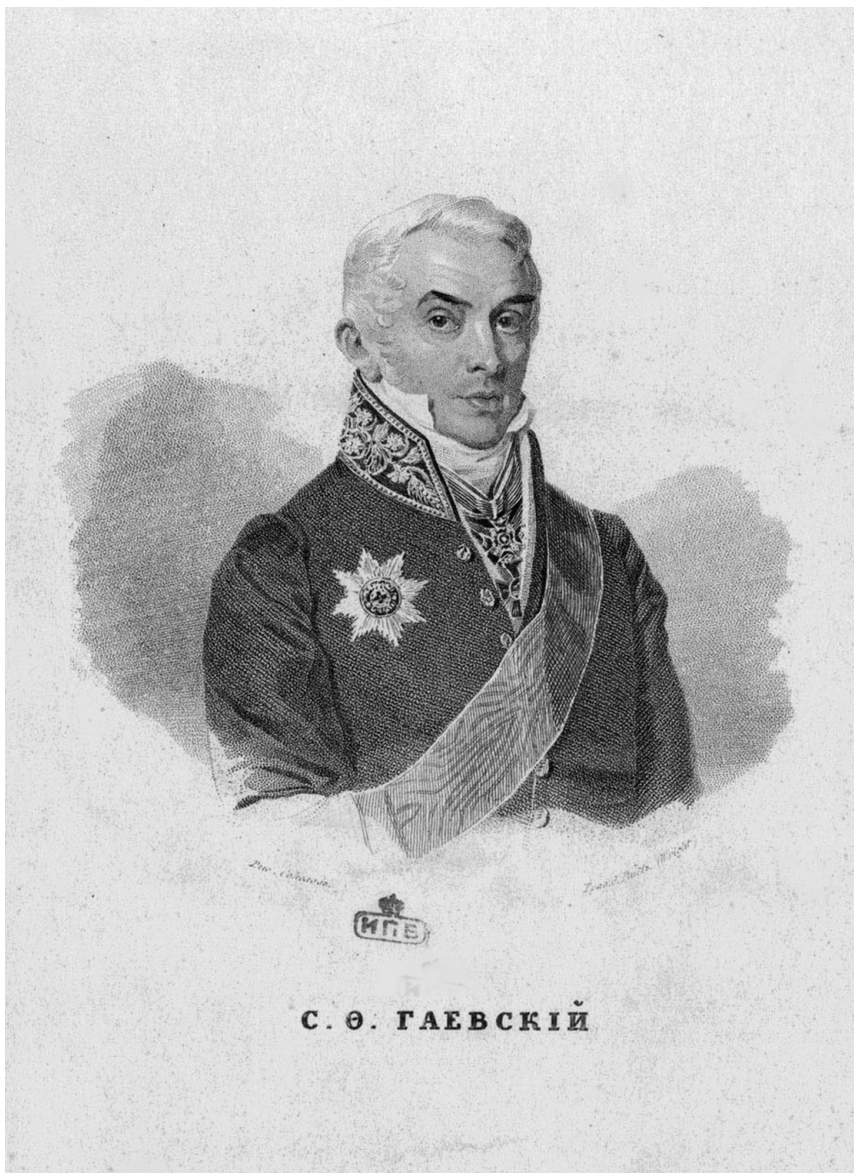
Forensic medicine was both a function of judicial practice and an intellectual endeavor. Both of these “faces” of forensic medicine developed in the early modern period and, in their origins, valorized direct sensory perception as the best method for providing secure knowledge about the natural and human worlds.<sup>34</sup> As such, the physician, in his forensic capacity, stood at the intersection of two traditions that had roots in empirical philosophy; these roots, in turn, shaped early legal procedure and the confluence of medical and judicial activity. While the imperatives and rules of legal procedure shaped the physician’s forensic role, the substantive core of forensic-medical activity was likewise regulated in a manner that dovetailed with these legal needs.

Besides the Military Statute, a parallel and complementary body of legislation governed physicians during their participation in legal processes. These rules regulated both the content of their work and their procedural relationships, and evolved within the parameters of inquisitorial legal procedure.

Shortly after its institution in 1803, the Medical Council of the Ministry of Internal Affairs produced the first of its continued efforts to regularize the details of forensic-medical activity. In doing so, the Council initiated the role it would continue to perform throughout the imperial period: the production of rules and instructions to regulate forensic activity, in a constant attempt to make forensic medical practice uniform and coordinated with the legal system. Initially, this meant reducing the great variability of physicians’ *akts* (legal reports) for court, not to mention the slipshod and brief manner in which they were written. These new habits of practice presented difficulties for the Council members, whose job it was to review physicians’ conclusions about cause of

death. As such, the Medical Council's first effort, in 1811, introduced a single form for the court *akt* of the dissection.<sup>35</sup> Their next effort, initiated in 1827 upon the directive of the minister of internal affairs, was the compilation of rules for forensic-medical inspections (*osmotr*) and dissections (*vskrytie*). These rules appeared in published, codified form in 1828 in the *Polnoe sobranie zakonov Rossiiskoi Imperii* and later the *Svod zakonov* (vol. 13) as "Instructions to physicians during the judicial inspection [*osmotr*] and dissections" (hereafter the 1828 Rules).<sup>36</sup> No detail of the physicians' activity was untouched by this regulation, which encompassed not only all steps to be taken during the dissection, but also the physician's relations to other court officials. In typical fashion, the governmental machinery handled the dissemination of these Rules; in 1829 the Rules appeared in a separate publication that was sent out to city and district physicians, as well as Medical Boards—thereby folding provincial activities more tightly within the administrative system. Despite later criticism of this legislation, the 1828 Rules proved an enduring framework that structured the practice of forensic medicine throughout the imperial period, and remained active until 1917.<sup>37</sup>

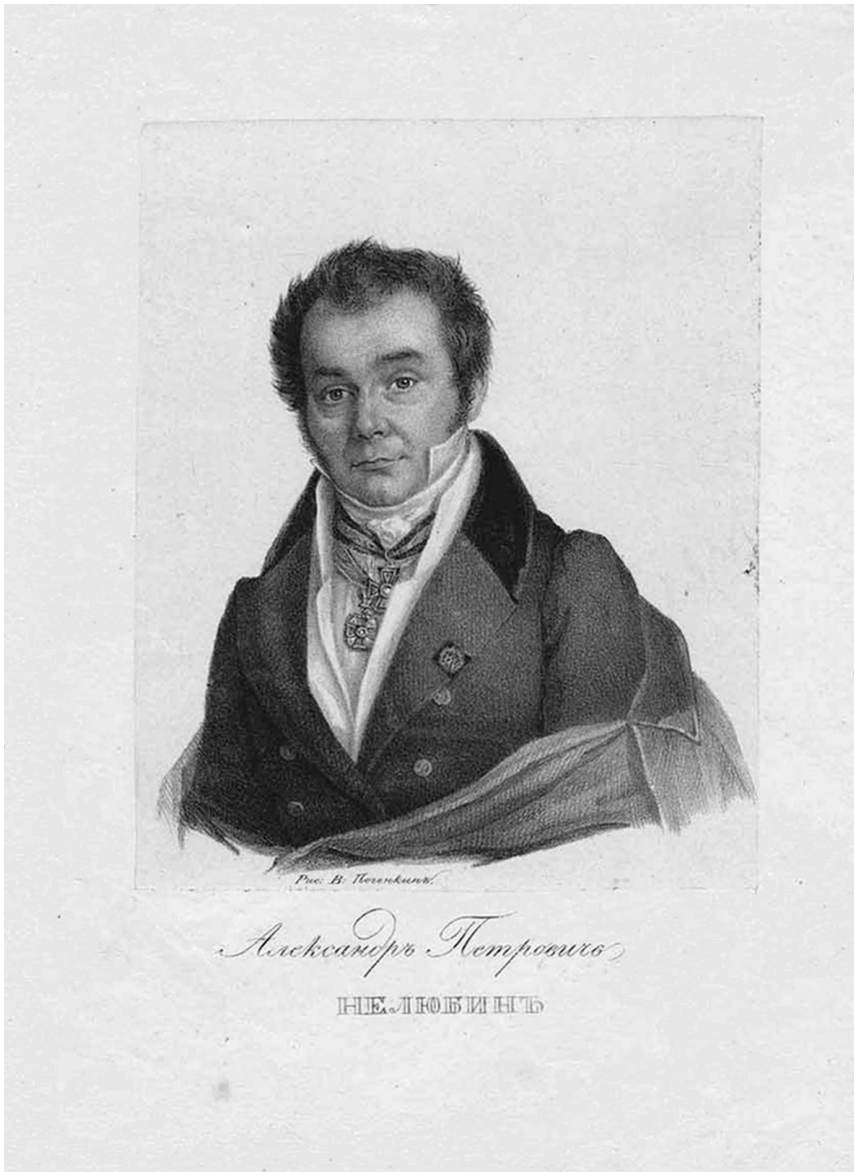
Who produced these medical regulations? It is important to recognize that this legislation was not the product of Peter or autocratic decree, but that of the contemporary medical elite. A half century later, in the post-reform period, the Statute of Forensic Medicine would be disparaged as a vestige of the past. In the words of jurist Anatolii Fedorovich Koni (1844–1927), this Statute suffered from "bureaucratic didactics, ossifying in retrograde conservatism."<sup>38</sup> However, in their origin, these Rules were an exception to other early-century legislation, and not a product of an insular officialdom or the bureaucratic formalism that Bruce Lincoln has examined in his study of the state bureaucracy.<sup>39</sup> Rather, the 1828 Rules were the product of Russia's leading figures in medicine, S. F. Gaevskii, I. V. Buial'skii, A. P. Neliubin, S. A. Gromov, who served as members of the Medical Council and compiled the legislation based on European statutes and materials.<sup>40</sup> To put this group of physicians into chronological perspective, at the same time that the Judicial Reform was being enacted, they were celebrating their



*Semen Fedorovich Gaevskii (1778–1862)*

*The honorary orders and European-style uniforms of these medical officials designated high rank and, by implication, authority.*

Lithograph, 1830s. Courtesy of the Russian National Library, St. Petersburg.



*Aleksandr Petrovich Neliubin (1785–1858)*

Lithograph, 1830s. Courtesy of the Russian National Library, St. Petersburg.

were celebrating their “50-year Jubilees.” Thus, from their student eyes, it would have been the inquisitorial system that was new, European, and rational.

These men fit the social profile of those entering medicine in late eighteenth-century Russia. Their modest beginnings were typical, as medicine at that time was a low-status occupation, drawing students from low-status backgrounds.<sup>41</sup> Like most young men entering medicine in the late eighteenth and early nineteenth century, the authors of the 1828 Rules represented a mixed bag of non-nobility backgrounds (and one Cossack captain) and seminary education (the training in Latin lent itself well to medical courses). As described in 1898 by the official historian of the Medical-Surgical Academy, students of this earlier generation came “from those segments of society not distinguished by gentleness of habit or by cultivation, and manifested many of the unattractive characteristics of this milieu—coarseness, a tendency to violence, drunkenness. This was particularly true of the seminarians.”<sup>42</sup> Whether guilty of such behavior, the authors of the Rules did train among other surgical students of like social background at the early surgical and anatomical schools (*uchilishche*) that Peter created following the Military Articles—to produce physicians (*lekari*) who would fill his new state service. Having earned their initial medical degrees, the authors undertook activities that set them on an elite track which traversed the overlapping worlds of academia and officialdom, including the following (for the majority): some combination of travel abroad; membership in societies (including foreign ones, such as Philadelphia’s American Philosophical Society); translations of German medical texts; degrees of doctor of medicine from the Medical-Surgical Academy, and later professorships at the same institution; and finally, membership in the zenith of medical officialdom, the Medical Council.<sup>43</sup>

Though these rules were intended to regularize forensic medicine, the execution of this goal was a different story. Gromov, as a member of the Medical Council, remained the central figure in working out the problems that arose in relation to the Rules. One problem—that would be a recurring one into the post-reform peri-



od—was that of police requiring physicians to perform forensic autopsies when they were not necessary.<sup>44</sup> This problem came to Gromov's attention not long after the 1828 Rules were published, in the form of a complaint that the Kazan Medical Board submitted to its administrative superior, the Medical Council. The Kazan Medical Board complained in 1834, that city and rural district (*zemskii*) police "incorrectly interpreted" the 1828 Rules which stated the precise circumstances when forensic examination and dissection were necessary. "Of the 200 forensic medical dissections that are conducted per year in Kazan province," the complaint read, "barely 10 or even 15 are done out of genuine need."<sup>45</sup>

Although these Rules were difficult to implement uniformly, they were more than just arcane rules in a dusty tome with no bearing on physicians; instead, the regulations were perpetuated in different forms and in a manner that was accessible to physicians, and indeed, ubiquitous in their training. As noted above, forensic medicine was both a component of judicial procedure and an academic discipline. And while not all professors of forensic medicine served the courts, and vice versa, these two "faces" of forensic medicine, necessarily, shared the same body of knowledge, training, and texts.<sup>46</sup>

Academic departments in imperial Russia lived and died by decree. Forensic medicine as a discipline was thus born under the first University *Ustav* (Statute) of 1804, which established a department of anatomy, physiology, and forensic-medical science (*sudebnaia-vrachebnaia nauka*) in Russian universities. This arrangement lasted until the next Statute (1835) which separated each of the three subjects into their own departments.<sup>47</sup> However, this separation was a mere formality, as there remained extensive overlap between these two fields in practice and personnel.<sup>48</sup> Forensic-medical dissections were done collegially by professors of forensic medicine and anatomy.<sup>49</sup> Professors in these fields would typically and seamlessly cross from one field to the other in their scholarly work and teaching; such a state of affairs was possible because, as historian of medicine Russell Maulitz points out, "medical knowledge had few fixed internal borders" in this period.<sup>50</sup> In fact, the

only difference between the forensic-medical and anatomical dissection, as Prussian forensic physician J.L. Casper pointed out in his textbook, was the objective. As he exhorted his readers,

[the] description of any pathologic-anatomical conditions, which have no relation to the question of death by violence—for example, the minute description of ovarian dropsy in a woman strangled; of Bright’s disease in one shot through the head, etc.—only protracts to no purpose the detention of the judicial functionaries, makes the protocol of the autopsy unnecessarily diffuse, and is totally irrelevant to the subject in hand, since the dissection is, and ought to be, a *legal* and not a *clinical* one.<sup>51</sup>

The Medical Council’s 1828 Rules sought to preempt confusion in this regard. The authors clearly delineated the bounds of the forensic dissection, and in their effort to instill uniformity, precisely spelled out the information that was required from physicians to serve the state’s legal-administrative objectives.

In short, the Rules not only served as the framework through which physicians learned forensic medicine, they also shaped physicians’ conceptions of their broader role and significance in the blended worlds of justice and state administration. Serving as a bridge between state bureaucracy and university, Gromov presented the corpus of these rules in the form of the first Russian textbook on forensic medicine.<sup>52</sup> This textbook became a staple for teaching the subject of forensic medicine to medical students in the pre-reform period. Moreover, these rules comprised a large proportion of the very subject matter that fell under the academic field of “forensic medicine,” and which students were responsible for knowing in the state-directed testing for their degree.<sup>53</sup> In general, the Medical Council saw to it that the rules they produced to regulate physicians’ activities were incorporated into the educational curriculum of medical departments, thus maintaining a direct line from legislation to lecture hall.<sup>54</sup>

Having examined how the spheres of law and medicine were related at the broader legislative/administrative level, we now turn to how this interconnection operated at the procedural level.

## LEGAL CERTAINTY AND MEDICAL STATUS

### Status and the Rules of Proof

Besides the physician's basic mandatory requirement to serve the courts, the rules of proof firmly ensconced medical knowledge within the legal process. Significantly, these rules at once elevated the status of medical knowledge above other forms of testimony, and rendered it beyond lay or legal challenge.

The inquisitorial system in general, and its rules of proof in particular, were based on the ethos and objective of "rational certainty."<sup>55</sup> The entire system was geared towards ensuring the certainty of legal judgments, and the Russian laws of procedure—like Continental codes—were devoted to prescribing the precise means by which courts were obliged to "get at the truth thoroughly."<sup>56</sup> The formal rules of proof were the mechanism by which this was accomplished.

Under inquisitorialism, rationality was ascribed to the rules of proof which drove the system of adjudication—not the individual judges who worked within that system. In this sense, the system was perfectly suited to what Wortman describes as "the autocrat's concern for justice and distrust for judges."<sup>57</sup> A fact was "proven" when the criteria specified by authority (via Code) had been satisfied.<sup>58</sup> It is in this precise sense that Continental adjudication is described as a "rational" method. "Fact-finding" was a skilled function in inquisitorial procedure. It involved the collection and interpretation of evidence according to the dictates of a body of theory—the doctrine of legal proof.<sup>59</sup> This doctrine was elaborated and refined by a tradition of proof scholarship extending from

the thirteenth-century canonists and legists to the commentators of the eighteenth century.<sup>60</sup> In Russia, this system lasted flush up to the reform—while in Europe, where the inquisitorial system started earlier—the system of legal proof also ended earlier.<sup>61</sup> This time difference is significant because unlike their Continental counterparts, Russia's "crossover" generation of medical and legal personnel operated under these rules of proof right up to the 1864 judicial reform, thus shaping their reception of that reform in a more direct and immediate manner.

The rules governing the weight afforded to certain kinds of testimony were mechanical in operation, and served as a substitute for the judge's discretion. The best proof was the voluntary confession, then followed witnesses' testimony, written statements, and the purifying oath.<sup>62</sup> With regard to the evaluation of witnesses, the social standing of the witnesses would determine the weight to be given to their testimony and hence the outcome of the case. In addition, the "Military Process" enumerated at great length the types of witnesses to be excluded.<sup>63</sup> Moreover, the court was required to give predetermined weight to testimony based on the status, age, sex, and number of witnesses. For example, the testimony of nobles, clerics, and property owners prevailed over that of commoners, laymen, and those without property. The testimony of an older man prevailed over that of a younger, and the testimony of women was either barred or given a fraction of the weight of a man's testimony. These and similar rules for evaluating evidence, in which all evidence was given an a priori arithmetical value (full proof, half proof, quarter proof, and the like), were based on what was believed to be common experience.<sup>64</sup> As we will see below, in this schema, the physician's testimony was given substantial priority and weight above all other types of testimony, barring confession.

After the 1864 reform, critics of this system would view it retrospectively through the lens of contemporary developments and trends in jurisprudence. In the 1890s, with the new emphasis on adjudicating guilt according to the "personality" (*lichnost'*) of the defendant (something ignored under the inquisitorial system), advocates of this trend (and, correspondingly, the broader role of

psychiatrists in the legal process) bluntly rejected the old system for positing as its central question “was the act committed” and not “is he guilty.” Jurists who advocated the new focus on personality consequently repudiated the former system and with it, its formal rules of proof, which left no room for such questions about the defendant’s individual personality. It was in this vein that eminent jurist and legal reformer A.F. Koni ridiculed the mechanical nature of the pre-reform procedure, stating that “there existed a recipe with which a verdict was reached: take two witnesses, not fully reliable, add to them one reliable witness, preferably a man to a woman ... and the verdict is ready.”<sup>65</sup>

Ironically, the inquisitorial system that reformers such as Koni disparaged, in fact, granted the physician the legal status, probative weight, and unfettered discretion that such reformers would seek for medical experts in the post-reform period. As I argue in this chapter, the limitation on judicial discretion (imposed by the rules of proof) entailed the displacement of that discretion to the physician. In terms of both the evidentiary weight (*znachenie*), and the procedural status (*polozhenie*) vis-à-vis other judicial actors, the physician and his form of knowledge—in theory and practice—enjoyed basically unconstrained discretion, autonomy, and immunity from external attack.

Before turning to where medical testimony fit within the rules of proof (the probative weight and status accorded to it)—and in order to better understand why it was accorded the weight that it was—it is necessary to first understand why the physician’s work was rendered central to judicial questions, and how it factored into the procedural system. To do so, we must dig one procedural layer deeper.

### *Corpus Delicti: The Fact of the Crime*

Under what procedural rubric did medical participation enter the process? The key tenet of Roman-canonical procedure that bound medical participation to the rational system of “legal certainty” was the legal concept of the *corpus delicti*. To bring about a con-

viction under inquisitorial procedure, the logic of the process entailed that two issues be proven: the commission of the crime, and that the accused was the perpetrator.<sup>66</sup> To establish the former, it was necessary to seek and establish the fact of the crime (*corpus delicti*, or, in Russian legal terminology, *sostav prestupleniia*).<sup>67</sup> Indeed, the doctrine of proof stipulated that the *corpus delicti* had to be proven as rigorously as the perpetrator's guilt.<sup>68</sup> The same rigor and theory that set judges to seek confession by means of torture likewise compelled Continental and Russian judges to seek rigorous proof of the essential fact: that the act of violence in question was responsible for death.<sup>69</sup> And in cases where this required establishing physiological facts (that wounds were responsible for a death, for example), the perception and judgment of persons skilled at interpreting bodily signs offered the surest evidence that reason could devise.<sup>70</sup> Physicians' participation thus arose out of this procedural imperative.

Because of the necessity to establish the fact of the crime with certainty—the logic of the inquisitorial system thus pointed toward obligatory medical assessment in cases of crime involving the human body. Based on this fundamental principle, the scope of the questions that required medical assessment expanded across the eighteenth and nineteenth centuries through an ongoing sequence of decrees beginning under Peter.<sup>71</sup> However, at its origin, it was this tenet of Roman-canonical procedure—the *corpus delicti*—that afforded a central role to medical knowledge; firmly situated the physician within the adjudicative process; and produced what Catherine Crawford refers to as the “valorization of medical evidence in relation to the inquisitorial mode of proof.”<sup>72</sup>

## Weight

Where did medical testimony fit within the system of proofs? The rules of proof afforded preponderant weight to medical testimony over other types. In terms of the hierarchy of proofs and their arithmetical value, medical testimony was at the top, and accorded the prized status of “complete proof.” Medical testimony stood by

its own strength, and had no requirements to meet other than not contradicting the “reliable” circumstances of the case. The legal criteria for the probative force of expert testimony (*svidetel'stvo*) was thus stated in the Russian rules of proof: “The testimony of medical *chinovniki* is accepted as means of complete proof [*sovershennoe dokazatel'stvo*], when it, having been conducted on legal grounds, contains clear and positive confirmation about the examined subject and does not contradict the reliable circumstances of the case.”<sup>73</sup> The privileged and weighty status of medical testimony is seen in more stark relief when considered in relation to other types of proof. On the one hand, it was second only to confession of the accused. The superlative and supreme status of confession (often extracted by means of torture) was defined in unambiguous and incongruously quaint terms, as “the best testimony in the whole world.”<sup>74</sup> In the other direction, the elevated significance of the physician's testimony is all the more striking by comparison to that of lay witnesses. While medical testimony by itself, *prima facie*, constituted complete proof, in order for “proof by witnesses” to be considered complete, it had to fulfill multiple criteria that were difficult to realize in practice.<sup>75</sup>

As discussed above, physicians did not have to comb through arcane law codes to learn of the legal rules that structured their forensic work, nor, in this case, the elevated legal status of their testimony. Both forensic-medical textbooks and medical regulations disseminated and reinforced among physicians the notion that their testimony carried decisive weight in adjudication. The Statute of Forensic Medicine thus stated that “The verdict is frequently based on the physician's opinion, which decides the honor, freedom and life of the defendant.”<sup>76</sup> As the academic translation of these regulations, Gromov's widespread textbook likewise conveyed the point that physician's forensic work and specialized form of authority was central and influential in legal decision-making and adjudicative outcomes. Gromov expressed this point in direct terms to his readers, stating that, “Forensic-medical testimony [*svidetel'stvo*], in conformity with the form and rules of Forensic Medicine ... *must serve for [judges] as some kind of basis or guide [rukovodstvo] during the decision of the case.*”<sup>77</sup>

This is not to say that the system could not also work against physicians; that is, if the judge did not grant the physician's conclusions the status of complete proof, he completely disregarded them. One physician who practiced under the pre-reform system commented on this issue, from his post-reform vantage point. Looking through the prism of the 1864 changes, which typically cast the pre-reform legal system in a negative light, physician E.F. Bellin complained of how medical testimony could be ignored under the former rules of evidence. Bellin, a Kharkov city physician who served the Kharkov courts before and after the reform, was a prolific advocate of expanding the physician's legal role and authority in the post-reform period. Not surprisingly, he did not approve of a system that had the capacity to dismiss medical testimony outright—though he did not comment on how frequently this happened. “The former proceedings,” Bellin described, “based exclusively on the strength of evidence, on the artificial selection of the latter, only gave legal weight to forensic-medical *ekspertiza* when it corresponded with the other circumstances of the case ... when there were no contradictions between [the physician's testimony] and other types of evidence. In the opposite case, *ekspertiza* was ignored and excluded from the system of evidence.”<sup>78</sup>

### Status

The authors of the medical regulations extended the dominant status of medical testimony in positive terms from the physician's knowledge and conclusions to the physician himself (vis-à-vis non-medical officials with whom he interacted on the social plane). The physician's status was clearly stated in medical regulations. The 1828 Rules read: “The physician, who conducts the forensic investigation, as a *chinovnik* ... is considered in this case the primary person [*pervoe litso*] [in charge].”<sup>79</sup> As with the issue of probative weight, Gromov translated and reinforced this tenet into broader terms for physicians in his textbook of forensic medicine. In Gromov's text, under the section “About the rights and responsibilities of the forensic physician during the investigation,” he wrote that



[t]he forensic physician is the *primary* [*pervoe*] and *essential person under the investigation*. He either conducts the investigation himself, or he assigns it to his assistant—but [the investigation] *must be under his direct supervision and guidance*. In all cases [the physician] *is responsible for the investigation* [*izcledyvanie*]; he observes and notes everything that during it will be seen [*usmotreno*] and discovered, *turning the attention of the Police Chinovnik to that not noticed by him, dictating the protocol* [*protokol*].<sup>80</sup>

Furthermore, Gromov added, the physician has input in designating the time and place of the examination.

This “first person” proviso, codified in law, remained active into the post-reform period, and as we will see in a later chapter, served as a touchstone for arguments to secure and expand the physician’s autonomy and rights in the post-reform period, after the rules of proof that structured and propped up this status were abrogated. In addition to granting elevated legal significance and status to medical testimony, the rules of procedure also insulated the physician and his testimony from external challenges.

### Immunity

Inquisitorial procedure was organized such that medical testimony was insulated from external challenges. In this regard, Continental procedure differs markedly from the English system. This difference with the English system (and post-reform Russian procedure that was modeled upon it) lay in the fact that under English adversarialism, medical witnesses had to present their observations orally, in the presence of parties and other witnesses, and could be challenged with little formality by any participant at the inquest or trial. By contrast, under the formal inquisitorial system, Continental and Russian experts submitted written reports on which they normally could be questioned only by a judge. And even then, in theory, the judge’s questions did not touch on the matter of content. Moreover, in practice, even this—according to physicians’

accounts (which will be considered more fully in the following chapter)—rarely happened, if at all.<sup>81</sup>

This is not to say that the procedural rules rendered the physician's testimony beyond doubt. Certainly, the law allowed for circumstances when the judge might have reason to question the physician's conclusions.<sup>82</sup> Procedure accommodated cases of doubt with specific administrative mechanisms of review. However, even in such cases, adjudication was put on hold until the medical matter was resolved, and significantly, the matter was pursued exclusively within the medical administration. In other words, the challenges to medicine from the legal side were negligible.

The important issue here is that neither the judge himself (nor the legal administration more broadly) could evaluate, judge, or diminish the strength of medical testimony. The judge forwarded all doubts or questions regarding medical conclusions to the medical administration where they would be resolved and returned to the court. In all such cases it was required that the judge, "not deciding the case/matter," transfer it via his closest authority (*nachal'stvo*) to the higher Medical Instance or *Rasprava*. These higher instances consisted of the provincial Medical Boards (from 1797), and above them, the highest instance of forensic-medical review, the Medical Council (from 1803).<sup>83</sup>

Though the institutions of Russia's medical administrative hierarchy were modeled directly on the Prussian system, the manner in which they were folded into the judicial-administrative process was unique to Russia.<sup>84</sup> This is exemplified in the courts' process of review for questionable or conflicting medical testimony. To be sure, in rough outline the Russian judicial process of administrative review over forensic medical activity was parallel to that of the Austro-Prussian-German model.<sup>85</sup> What was distinct in the Russian case, however, is the fact that all review remained within the confines of the state medical administrative hierarchy; in the European countries, by contrast, such matters were passed on to the universities. As an example, in Austro-German process, the courts could turn to university professors at any stage of the process, and under circumstances of vagueness or disagreement, the investigator could turn to the medical faculty (*fakul'tet*) of the near-

est university.<sup>86</sup> Or the court could do so simply when “upon reason of the importance of the case,” it considered it necessary “for the accurate discovery of truth to request the opinion of the faculty.”<sup>87</sup>

In Russia, however, even conflict and disagreements between physicians were folded into the state’s administrative system. As in questions of doubt, the judge/court did not evaluate or make a judgment on the disagreement, but again, simply forwarded the matter to the higher instance of the medical administration. Conflicts or disagreements did not weaken the strength of the testimony in any way. Once resolved by the higher instance, the medical opinions received full strength once again. However, when such cases of conflicting testimony arose in practice, judges seem to have circumvented the formal system of review with the more informal practice of simply picking a side. Kiev physician Simonich described how, typically, the court decided cases of conflicting testimony according to the “age and social status of the physician,” which, he added, were presumed to be connected with “knowledge and experience.”<sup>88</sup> Indeed, this method would be in keeping, roughly, with how witnesses’ testimony was ranked according to the formal rules of proof. It also, however, could have little or nothing to do with procedural rules, and simply reflect the common social practice (at least with regard to nineteenth-century medical practice in different national settings) of attributing credibility in proportion to social status.

As with the courts’ circumvention of the formal administrative channels for “conflict resolution,” as seen above, it also appears from physicians’ accounts that judges rarely if ever employed their prerogative to question medical testimony, or send it for higher review. As Simonich described, it was the norm for courts to accept physicians’ medical opinions at face value. “It was enough to call an appearance by its name, and the existence of it was indubitably, completely proven.”<sup>89</sup> This was the case regardless of subject matter. By way of example, Simonich explained that the physician simply had to state “that the heart of the dissected corpse was hypertrophied—and the fact of hypertrophy of the heart received full sanction.”<sup>90</sup> How does one account for the court’s immediate and blind acceptance of the physician’s conclu-

sions as a norm of practice? Indeed, day-to-day functioning of the courts often strayed from proper procedure, and Richard Wortman has convincingly demonstrated that the operations of pre-reform courts were far from efficient, staffed by minimally trained legal personnel.<sup>91</sup> To be sure, fecklessness and/or venality could in part explain why judges did not question physicians' opinions and instead accepted them without scrutiny, virtually ignoring the administrative channels of review. Notwithstanding such human failings and entrenched norms of practice among the court staff, these factors do not preclude the main point here, which is that procedural laws structured the parameters of practice, and in particular for our purposes, as it pertained to physicians. It is thus important to note that at a minimum, the rules of procedure did not provide structural imperatives or incentives to challenge the physician's medical testimony or knowledge base in any way (as adversarial procedure would, after the reform).

### INSTITUTIONAL IMMUNITY AND BOUNDARY MAINTENANCE

The insulation of medical knowledge (from legal evaluation, challenge, or criticism) in Nicholaevan Russia was not limited to the procedural sphere. As I argue in the remainder of this chapter, the privileged and protected status of medical testimony, which originated under the rules of procedure, served as the grounds and engine for extending this status to the broader administrative-institutional level. Top governmental offices (the pinnacles of the medical and judicial hierarchies, the Medical Council and Senate, respectively) reinforced the boundaries that cordoned off medical work as an autonomous fiefdom, and insulated it from external criticism or attack from other administrative spheres, and the legal one in particular.

When boundaries were crossed there were administrative consequences. One illustration of how officials actively maintained

these boundaries is a controversy that arose in Olonets, the neighboring province to St. Petersburg, and home of the mineral springs that Peter the Great visited for his failing health. In this incident, officials of the local judicial institution (Judicial *Palata*) published comments that were critical of physicians' forensic activity. The crux of the offense was that officials from the judicial sphere spoke to medical matters. The chain of institutional response that arose from this incident—starting at the provincial level and traveling to the highest reaches of government—reveals two important aspects about the early development of administrative-institutional boundaries between medicine and law. First, it demonstrates that these boundaries were not “invisible” or limited to the theoretical or even procedural realm, but “experienced” and extended to daily administrative life; transgression of administrative boundaries stood out in sharp relief to the average observer (albeit a state administrator or official). Second, this case shows that the definition, protection, and maintenance of these boundaries was initiated and implemented from within the state, by top medical and legal officials.

The problem began when the Olonets Judicial Chamber published in its local provincial bulletin (a governmental publication) a commentary that accused the province's forensic physicians of “inattentiveness to the demands of forensic medicine.”<sup>92</sup> The provincial head (*nachal'nik*) of Olonets Province saw this type of commentary as a breach of jurisdiction, and brought the issue to the Ruling Senate, who forwarded the petition along the standard governmental pathway for medical matters: Ministry of Internal Affairs to Medical Department to Medical Council, both under the purview of the Ministry of Internal Affairs.

Defending the “protected status” of their ranks, elite medical officialdom likewise viewed the court's behavior as an administrative violation, and one that needed to be checked. The Medical Council agreed with the *nachal'nik* that the Judicial Chamber's comments were “completely unsubstantiated” and “insulting” for “all forensic physicians of the Olonets province” as well as the Medical Boards, whose responsibility it was to oversee all forensic-medical investigations and documents. Beyond this, the public

manner in which the Judicial Chamber disparaged the physicians' activities was a compounding problem. Not only was the accusation incorrect, it was deemed wrong to use the governmental publication as a vehicle for making such accusations public—and all the more when they violated one's administrative jurisdiction. To use the provincial bulletin to such ends was “not in harmony with the goal and character of this governmental publication.”<sup>93</sup>

More than simply a case of petty provincial bickering, at the center of this issue rested the larger question of institutional boundaries. The Olonets *nachal'nik*, in conjunction with the Medical Council, wanted the Senate to draw in bold strokes the line between the courts and the physicians within them. The Medical Council did not intend these parameters to protect simply against gross breaches of jurisdiction, but they sought boundaries of a more subtle nature, that is, to ensure that physicians' activity and knowledge base retain the same insularity at the broader institutional level that they enjoyed at the procedural level. In other words, these parameters were to protect physicians and their work from any form of criticism or judgment from legal officials and the courts more generally. The Medical Council wanted the Senate to put its full weight behind the enforcement of that boundary. Specifically, the *nachal'nik* and Medical Council asked the Senate to “indicate to the Olonets Chamber of the Criminal and Civil Court those boundaries from which it should not exceed, during rash, open (*glasnyi*) discussion of the activity of forensic physicians and Medical Boards.”<sup>94</sup>

Significantly, for our purposes, it was the preponderant legal weight of medical testimony within legal process that drove the *nachal'nik's* argument for extending that special status to physicians beyond the court's walls. As the *nachal'nik* saw it, such public slander was particularly unacceptable when leveled against “forensic medical investigations [*osmotr*]” which “have such important influence on the course of criminal processes.”<sup>95</sup> The reaction of this Olonets administrator illustrates not only that the legal significance and influence of medical testimony was understood broadly within administrative circles—even among those who were not direct medical/legal participants—but this procedural status

shaped thinking about and policy towards physicians more generally. The main point here is that it was the privileged *procedural* status of medical testimony that served as impetus and justification for the broader reinforcement and reproduction of that status at the institutional-administrative level.

In the end, the Medical Council agreed with the *nachal'nik's* proposed resolution, while at the same time applying what it had just learned about the use of publicity. To the *nachal'nik's* suggestion, the Medical Council added only that the Judicial Chamber be hoisted by its own petard, recommending to the Senate that it publish its rebuke in the same Olonets governmental bulletin in which the offending accusation was leveled against physicians.

### Drawing Limits

Notwithstanding the procedure-bound autonomy and privilege of medical testimony, physicians did not have *carte blanche* when it came to the scope of their authority. The boundaries that both insulated and defined the medical sphere were not only legally structured, they were also administratively monitored. This “border patrol” operated not only from outside in (keeping the legal side out of medical matters), but also inside out (keeping medical out of legal matters). While this undertaking was in the hands of professional groups in the West, in nineteenth-century Russia the state and its officials took responsibility for drawing and maintaining occupational/intellectual/practical boundaries between medicine and law.<sup>96</sup>

The enforcement of boundaries took place at both the local/provincial and center/elite administrative levels. To ensure the integrity of administrative jurisdictions—and in the process, distinguishing the intellectual terrain of medical and legal questions—the highest medical and legal governmental bodies worked jointly, while not always seeing eye to eye on just where the boundary was to be drawn.

Minister of Justice V.N. Panin in 1843 raised precisely this concern with the highest reaches of medical officialdom in a complaint

that physicians, in their forensic conclusions, exceeded their medical sphere and “encroached” on properly legal matters. A firm believer in the inquisitorial system, Panin made it his mission as minister to replace the disorderly operations of the courts with the precision that the inquisitorial system offered (at least in theory) and which he admired.<sup>97</sup> It is reasonable to assume that his personal attention to sharpening the boundary between the medical and legal spheres was part of this broader effort. In his correspondence with the Medical Department, Panin wrote, “From many criminal cases, which the Ruling Senate and Ministry of Justice receive for their review, it is clear that the medical officials [*chinovniki*], invited for inspection [*osmotr*] and testimony [*svidetel'stvo*], giving conclusions regarding subjects of Medical police and forensic medicine, frequently allow themselves to give opinions about such subjects in the case, which do not pertain to their circle of responsibilities.” Not only did physicians exceed their sphere of duty, they did so in a manner that directly impinged on the court's. Panin accused physicians of voicing opinions, for example, “about guilt or innocence, and about the defendant's intention or negligence in a crime—and which pertain directly to the responsibilities of the court, comprising the substantive subject of its consideration and determination.”<sup>98</sup>

Why did casual instances of occupational overreach—certainly not the gravest of administrative lapses, nor something exclusive to medical *chinovniki*—catch the attention of the minister of justice? What transformed something dismissible as overenthusiasm or easily overlooked within a court system rife with disorder into a pressing concern? As we saw in the above case, so too with Panin: it was the preponderant legal weight of medical testimony and, correspondingly, its influence in court cases that underlay the interest in and necessity of drawing administrative boundaries. The privileged significance ascribed to physician's conclusions meant that the physician's forays into legal questions would have adjudicative consequences. Regardless of the category of the issue at hand—be it about medical cause of death, or the legal question of guilt and intent—the physician's conclusions would carry the same decisive weight. This would make the medical *chinovnik*



even more influential than he already was and, in effect, usurp the role of the judge (who himself was a proxy of the state) in determining the outcome of cases.

As the minister of justice confirmed, medical testimony was a powerful element in judicial proceedings. While Panin acknowledged that the conclusions of the medical *chinovnik* need not “bind” the judge, and it was the judge’s prerogative to “reject” them, he conceded that in practice, this did not happen. On the contrary, physicians wielded strong influence over judges, particularly those who were less experienced or, more likely, less conscientious. “In view of the importance that the law grants to medical testimony,” Panin asserted, the physician’s conclusions “can influence a judge’s opinions, especially in courts of the lower instances.” Besides this practical consideration, deriving from the status of medical testimony, Panin also objected to physicians’ transgressions on the more general grounds that they simply were not proper form. “In general,” he added, “conclusions about the character of the crime and guilt of the defendant, prior to judicial review of the case are, in any case, premature and inappropriate.”<sup>99</sup>

From the perspective of medicine’s top brass, however, things could not have looked more different. The Medical Council’s response to Panin illustrates a clear divergence between legal and medical interests and perspective, while both were shaped by and embedded within a common state administrative system, and well before any professional agenda was even a figment, much less a reality. Both legal and medical spheres shared the main objective of administrative order; what varied was their view of how the administration of that order was to be divided.

The Medical Council objected to the minister of justice’s interpretation on every count.<sup>100</sup> Elite medical officialdom defended their ranks, turning the burden of responsibility back onto the legal side, and exonerating physicians. First and foremost, the Medical Council rejected the very premise of Panin’s complaint. The Medical Council, being the highest level of administrative review of forensic medical reports, denied that physicians crossed into legal territory in the way Panin suggested. Of the reports that we receive, the Council countered, only “a few” were of this type

where the physician would “leave their designated sphere of activity.” And among those, “none were of a type that infringed on the rights of judges via unnecessary explanations,” as Panin had claimed. If anything, the Medical Council objected, the exact opposite was the case, and physicians’ reports suffered from “insufficient explanations,” rather than excessive ones.<sup>101</sup>

In either case, the Medical Council saw judges—not physicians—as ultimately responsible for the gamut of these problems, as well as their solution. In cases of the “first of these sins,” that is, physicians’ excessive explanations, “judges that are wise and knowledgeable of the case can easily correct this problem by not paying attention to anything superfluous in the medical testimony.” As for the second problem, the Council dismissed insufficient testimony as being the consequence of “young and inexperienced” physicians, “not knowing precisely what was required from them.” While giving a polite and perfunctory nod to the minister of justice’s proposed solution—that Medical Boards more strictly supervise the activity of their subordinate physicians (who served the courts)—the Medical Council shifted the responsibility back to the legal sphere in their vision of the problem. “It would be highly desirable if judicial institutions, in designating the examination of corpses, indicated each time, in advance, their goals for which the dissection is being undertaken, and gave to physicians clear and definite questions, which they should answer.”<sup>102</sup>

Finally, and most significantly, the Medical Council argued that physicians were completely justified in speaking to the very issues that the minister of justice had defined as strictly “legal.” In the Medical Council’s rendering, questions of “intent” or “guilt” could, depending on circumstances, fall within the physician’s rightful terrain.

During several [types of] forensic-medical investigations, such as: infanticide, suicide, rape and other such cases, often circumstances are discovered that closely connect with the question of intent, negligence, guilt or innocence of the defendant, to which, for the clarification of the legal ques-

tion, the forensic physician is obligated to turn the attention of judges; and which, without indication from [the physician's] side, would remain unnoticed by them.<sup>103</sup>

Thus while the Medical Council acknowledged that physicians spoke to such questions, they did so approvingly and denied that this in any way exceeded their rightful bounds or “encroached” on the court’s terrain. In this way, the medical administration flatly rejected the line that the minister of justice attempted to draw, replacing it with their own, more encompassing one.

The upshot of this exchange of views was the Senate’s passage of a law in 1844 which supported and served the medical view.<sup>104</sup> After being notified of the Medical Council’s position (via the minister of internal affairs), the minister of justice proposed the medical officials’ suggestions to the Ruling Senate [the top legislative organ], inquiring “whether or not it wished to make a general legal order [*rasporiazhenie*] regarding this subject.”<sup>105</sup> The Senate did just that, and in their legal ruling, they directed their orders and implicit reprimand to the courts and police (placing accountability there)—rather than to the medical side, which retained its full discretion. Moreover, in writing its order to courts and police, the Senate took its wording directly from the Medical Council’s comments. The ruling read that

[i]n order to avert the aforesaid inconveniences, it is [necessary to instruct] Provincial and Regional [*oblast’nye*] Boards, Governments, and other such places, that the authorities located in them confirm to the city and rural [*zemskii*] police, as well as courts of the first instance, that they, when designating the forensic examination [*svidetel’s tvo*] of corpses, when possible, each time indicate in their request their goal for which it is being undertaken, and under this, suggest clear and defined questions which [the physician] must answer.

Besides being delivered to provincial and regional governments, the order was also to be sent to all criminal chambers (*palata*),

regional criminal courts, provincial courts, civil governors (*grazhdanskii gubernator*)—and in St. Petersburg, to the chief police officer (*ober-politseimeister*), the Second Department of the Board of Public Order (*Uprava Blagochiniia*) and the minister of internal affairs.

A separate, but related and increasingly central arena in which the question of boundaries came into dispute in this period was the issue of responsibility/imputability (*vmeniaemost'*).<sup>106</sup> Here, it was legal academics initially—with state officials joining them in later decades—who raised objections to the extension of medical participation into this legal question. Though it overlapped with the question of the forensic physician's appropriate parameters, the controversy over legal responsibility had distinct historical-intellectual roots, and as such developed along a separate, if parallel and intersecting, track.

Debates over the responsibility question, emerging in the 1840s, fell squarely within a broader political-cultural debate of free will versus materialism/determinism that cut across intellectual traditions, developments in biological psychology, and political ideology.<sup>107</sup> The convergence between this intellectual debate and the question of medical-legal boundaries was not unique to Russia, and is embodied in the views of Moscow professor of law Sergei I. Barshev. A prolific advocate of free will in the 1840s—and consequently, a strong opponent to materialism—Barshev's intellectual stance also rendered him one of the earliest and most prominent opponents of medical authority in the legal setting, a position which assumed heightened relevance when this issue exploded into public debate after the reform.<sup>108</sup> Though historians generally have presented Barshev one-dimensionally as a reactionary publicist, it is important to note that Barshev's views were grounded in scholarly argument and in full engagement with contemporary European thinking. Barshev expressed his views in his influential and academically respected tracts on criminal law, responsibility, and punishment.<sup>109</sup>

Beginning with his doctoral dissertation, "On the Measure of Punishments" (1840), Barshev's scholarly interests and teaching

remained focused on the legal issues of punishment and responsibility. His education afforded him the tools to familiarize himself with the latest foreign thinking on these topics. Languages provided one means of access: the number of languages Barshev studied increased proportionately with his ascent up the elite seminary institutions of Moscow, beginning with Greek and Latin then adding French and Hebrew. Hand-selected in 1828 for the study of law under the Second Section of His Imperial Majesty's Chancellery, under Count Michael Speransky, he studied Roman law while adding German and English to his portfolio. But books were not his only channel to European legal thinking and practice; Barshev learned German law firsthand, being sent for six semesters of legal study in Berlin. Upon his return, he turned his attention to the study of Russian laws, newly compiled for the first publication (1832) of the *Svod Zakonov* (Digest of Laws), and completed his degree of Doctor of Jurisprudence. Coinciding with the 1835 University Statute, he began what was to be a long and successful career on the Legal Faculty of Moscow University, as a professor of criminal and police law. Barshev shared his breadth of comparative legal training with his students. In his course on criminal law and procedure, he taught the two main forms of procedure, accusatorial and inquisitorial (rather than simply the latter, which was currently employed in Russia); and for "greater understanding" of Russian laws he would compare them with contemporary foreign legislation. His rise up the professorial ranks culminated in his post as dean of the Legal Faculty.<sup>110</sup>

Barshev's educational background and scholarship demonstrates that training in and espousal of Western legal practices and theory did not necessitate a modernizing approach to all intellectual or practical questions, and indeed, could coexist easily with conservative political and intellectual positions. However, Barshev was not absolute in his idea of free will. He was willing to acknowledge that one could not speak of free will "in all human manifestations." Frequently, he claimed, one must explain the most extreme and cruel evil acts—such as patricide and matricide—according to the "lowest purely animal force of impulse. He who has met in

large cities, among the lowest and most vulgar class of people [*narod*] ... [those] like animals in a human form," must agree with us that "out of respect for moral law one must not speak about the aforementioned evil acts, as human evil acts, but it is necessary to view them only from the physiological side."<sup>111</sup> Thus, he did not reject biological explanations altogether, but at the same time, was not prepared to sacrifice the concept of free will. If his views are to be characterized at all, they reflected a middle ground.

In this respect, Barshev was not willing to go as far as physicians on this question; and herein lay his reasons for rejecting the physician's role in the legal responsibility question. "Such discussions among physicians and psychologists [*psikholog*] are not surprising," Barshev observed. "The former, according to the very character of their science, typically exaggerate the influence that the body has on the soul [*dusha*]; and the latter, in their aim to explain more and more the mechanism of human activity, by necessity go too far and in this way fall easily into materialism."<sup>112</sup> It was, in Barshev's view, the extremism, not the principle of the medical/physicalist view that rendered it untenable. Physicians and psychologists, he mused, "naturally ... cannot be pleased with the secret, mysterious, inscrutable, and inexplicable freedom of human activity; meanwhile, conversely, for their pride, it must be very pleasant to have certainty that they were able to penetrate to the very interior and secret springs of human activity."<sup>113</sup> Barshev's views on the physician's role in the court stemmed from this fundamental intellectual stance which repudiated physicians' physicalist explanations of behavior. Barshev carried these views into the reform period and publicly discredited the authority of the medical expert, rejecting the idea that physicians' legal authority was based on any intrinsic value to their knowledge, and arguing instead that it was granted by the state.<sup>114</sup>

This issue of the physician's competence and authority relative to the judge (in explaining human behavior and speaking to the issue of responsibility) continued into the post-reform period and served as a line of argument and precursor to the broader cultural and official debates over the medical expert that exploded after the implementation of the reform.<sup>115</sup> As Chapter 5 will examine, this

original site of conflict—the question of responsibility—and associated lines of argument would be absorbed into that broader debate over medical expertise, while retaining its own particulars.<sup>116</sup>

### THE VIEW FROM WITHIN

In the early years after the judicial reform, physicians joined a strong chorus within the educated public in repudiating the inquisitorial system. However, to understand physicians' response to the judicial reform and the expectations that they brought with them into the reform period, one must consider how physicians felt about the system while they worked within it. How did they perceive of their role and relations within the inquisitorial system that shaped their experiences?

In seeking to answer these questions, it is necessary to bear in mind that under Nicholas' rule (1825–1855), censorship would have precluded any commentary that was critical of the state or its administrative manifestations; conversely, laudations of the state and its system were a trope, if not a requirement under official ideology.<sup>118</sup> Notwithstanding these qualifications, and attempting to read between the lines of the period's writing conventions, I turn to physicians' university lectures—and the manner in which professors of forensic medicine presented their field of activity to a novice audience—in the absence of other published or public forums in which physicians could discuss their court duties from a broader perspective (as opposed to their published articles that adhered closely to the scientific content of their work). These lectures allow one to glean how physicians perceived their role in the courts, the procedural system in which they worked, and their relationship to jurists.

The lectures of two prominent professors of forensic medicine—who taught in leading university centers of forensic medicine in the 40s and 50s—offer insight into this question.<sup>118</sup> The viewpoint of this academic generation is also essential for understand-

ing later developments, as these professors of the 40s instructed the “crossover” generation of forensic physicians, who, in turn, carried this pre-reform perspective into their post-reform experience. Professors Ivan F. Leonov of Kiev University and Georgii I. Blossfeld of Kazan University were of this “first” generation, and their career trajectories overlapped chronologically. Both were born at the turn of the nineteenth century; practiced medicine in the field early in their careers (Leonov, tending to the cholera epidemic in Kharkov; and Blossfeld, working in various medical institutions in Kurland [Latvia]); earned the highest academic degrees in medicine; and taught those young names who would later, in the first years of the reform’s implementation, become familiar as the leading advocates of medical expertise and associated reform to expand and secure the physician’s legal role along the lines of its pre-reform stature.

Despite achieving equivalent academic end points, the career paths of these two professors varied, and represent the different manners in which one could pursue a career in academic medicine, and forensic medicine in particular: the slow climb up provincial institutions and administrative ranks versus the fast-track prestige of training in Europe and Russia’s elite center (St. Petersburg).

Ivan Leonov worked his way up Russia’s provincial institutions the hard way. He paid his dues (with little career payoff initially) by logging many years of teaching and 112 instructional dissections, while simultaneously training and taking exams for additional medical-administrative titles.<sup>119</sup> Despite a chain of professional hard luck, Leonov pressed on in his ascent up the academic ladder. After being skipped over for professor of anatomy at Kharkov University (in the very department where he had taught the subject for almost a decade), and upon earning his degree of Doctor of Medicine and Surgery in the same year, Leonov applied in 1838 for a position in the Department of Forensic Medicine at Kazan University. His competitor for the position was Georgii Blossfeld, to whom he lost the job. Leonov persevered, however, and after a short stint as a professor at the Vilna Medical-Surgical Academy (which, thanks to more bad luck, closed in 1842, two years after



Leonov arrived), he finally found a permanent base for his career at Kiev's University of St. Vladimir. In Kiev, his career blossomed and he served for eleven years as chaired professor (*ordinarnyi professor*) of state medicine (*gosudarstvennoe vrachebnovedenie*), taught students at the clinical forensic-medical section of Kiev Military Hospital, and participated in the local medical society, in addition to other societies.<sup>120</sup> At the University, he continued the type of teaching that he had done in his years at Kharkov: training students in the conduct of forensic-medical dissections, and reading lectures in the vast array of subjects that fell under state medicine.<sup>121</sup> His teaching career was cut short prematurely, when the poor health that had plagued him since his youth finally overcame him in 1854.<sup>122</sup>

While Leonov's career evolved within the provincial cities of Ukraine, Blossfeld's was shaped by European experience. Of German heritage, Blossfeld was born in Kurland into a merchant family. His German connection was strengthened further when young Blossfeld went to Berlin to pursue his medical studies, where he completed his medical degree at Berlin University. He followed that cosmopolitan career start in equally prestigious fashion, pursuing his degree of doctor of medicine at Russia's top medical institution, the St. Petersburg Medical-Surgical Academy. This elite track, interrupted by ten years of medical practice in his native Kurland, was resumed with ease in 1838 when Blossfeld sought and secured the Kazan University professorship in forensic medicine, over his hardworking competitor, Leonov.<sup>123</sup> What the two men did share in common, for the bulk of their professorial years, was the teaching of forensic medicine on the law faculties of their respective universities.<sup>124</sup>

Despite their different backgrounds and career styles, the two professors, in their lectures to young law students, presented an unmistakably similar vision of the state, justice, and the physician's place in relation to them. In these lectures, the story of forensic medicine's development and organization revolves around the single, central guiding idea of the state's wise patronage. Amidst this common refrain—which functioned as part

genuflection, part explanation—three intertwined themes emerge in the authors' conception of the physician's role and relationships in the legal setting.

The first theme is an overriding faith in the rationality of the inquisitorial system. In standard nineteenth-century Russian narratives, forensic medicine is depicted as complementary to and a supplement of law. As such, the authors' depictions of the physicians' role fall under a broader discussion of the laws that regulate them, and in the case of Blossfeld, the procedural system in which they worked. Western historians often describe Russia's pre-reform legal system as synonymous with arbitrariness. While this general characterization may be sound, it is necessary to point out that these accounts typically do not differentiate the procedural system from the broader administrative complex in which that procedure operated. Physicians who worked in that system, however, drew a distinction. As Blossfeld believed, the inquisitorial procedure represented the antithesis of arbitrariness.

Though a physician, Blossfeld had strong opinions about the inquisitorial system, and in particular, in contrast to the adversarial system. It is not surprising that Blossfeld would have more than anecdotal views or passing knowledge of legal systems; his connections to the legal faculty were strong—both on a professional level, and in terms of his scholarly interests. Reflecting the German influence in his orientation to forensic medicine—in particular, the German focus on the teaching of forensic medicine to jurists—Blossfeld's major work was a textbook of forensic medicine for jurists, to be used for university teaching, and published in 1847.<sup>125</sup> Blossfeld was gratified with the broad and favorable reception of his textbook, stating that his work "turned out useful not only for my students, as annual testing predominantly revealed, but it found sympathy in other circles of society."<sup>126</sup> His linkage to law was confirmed through formal channels as well. Not only did Blossfeld teach courses for the law faculty, two years after his text was published, he was fully appointed to the legal faculty, in the absence of a chaired professor. Reflecting the interconnected relationship between Russian law and medicine in the eighteenth and nineteenth centuries (and no doubt another dose of practical necessity),

physician Blossfeld was named dean of the Faculty of Law and served in that capacity in both 1850 and 1855. Given his strong ties with the legal faculty and his scholarly interest in the legal dimension of forensic medicine, it is not surprising that Blossfeld would be familiar with current legal developments and trends.

Blossfeld's interest in Continental legal trends—the replacement of the inquisitorial system with adversarial, open proceedings—was clearly shaped by its implications for his own field of forensic medicine. “There is no doubt,” he declared, “that the new direction of criminal law in many foreign countries—publicity and orality, in connection with jury verdicts—will have an influence also on forensic medicine.”<sup>127</sup> From this perspective, Blossfeld firmly defended the inquisitorial procedure on the grounds that it operated according to an unwavering logic. Historians typically contrast the post-reform legal system with that of the pre-reform period, by characterizing the latter as arbitrary. However in the view of this pre-reform actor, it was the adversarial system that invited, and almost assured arbitrariness.

Thus we see in France, on the one hand, the arbitrariness of uneducated juries, who often acquit in defiance of that which is obvious, and in opposition to clear rules; and on the other hand, the abuse of mitigating arguments in those cases where circumstances that point to the strengthening of guilt are revealed—to say nothing about the fact that the accused is subject to the court of ignorance, or the victim of unconscious impulses, not restrained by any kind of fundamental investigation....<sup>128</sup>

Rejecting the Continental trends in favor of inquisitorialism, Blossfeld saw no reason to renounce the entire system in the interest of reform. “No matter how lauded the aim of today's foreign legislation—to finally throw off the shackles of Roman-canonical rules on the character of evidence—one should not find it necessary to renounce the inquisitorial principle in favor of the accusatorial.”<sup>129</sup>

As he saw it, all of the key components of inquisitorial procedure ensured a rational path to justice, by comparison with what

the alternative system offered. On all counts, inquisitorial procedure ensured the control that was necessary to ward off arbitrariness: verdicts based on logic versus “internal conviction and accumulation of impressions”; “reliable decrees of government” versus “impulses and ignorance of the jury”; “written conclusions” versus “testimony of the eye and ear.” All of these elements of inquisitorial procedure, which Blossfeld saw as superior guarantors of “truth,” were the very mechanisms by which medical testimony exerted its influence and enjoyed protected status in the administration of justice.

A second theme was the core role and correspondingly special status of physicians (*qua* transmitters of science) in the state’s broader enterprise of maintaining social order. This view was consistent with and predicated upon what Medical Council member and author Gromov had called the physician’s “guiding role” in legal decision-making. To guide the judge was to guide justice, and thereby contribute to the state’s overriding project of administering order. However, Blossfeld did not simply insert physicians into a static picture of social structure. In making this claim, Blossfeld challenged the state’s traditional criteria of social ordering, by introducing specialized knowledge as a basis for elevated status within the social hierarchy. While working within the existing official categories, he transposed his occupational cohort to the highest stratum, positing them as an elite along the lines of the state’s closest social ally and partner in rule, the nobility.<sup>130</sup> In his words, “Scholars comprise a special aristocracy (*aristokratiia*).”<sup>131</sup> Given the low-status backgrounds that characterized medical graduates in this period, this equation was a bold jump indeed.<sup>132</sup> Notwithstanding its brazenness, this claim was fully consonant with and a natural (if deliberate) extension of the privileged and influential status of medical knowledge in the rules of procedure, and day-to-day operations of the court. Blossfeld, in this way, simply translated uncontroversial, everyday legal norms into social terms.

This perception of the physician’s social role echoed the character of the physician’s procedural status in two important respects. First, it was rooted exclusively in the physician’s particular knowl-

edge base. Second, it was likewise to be immune from external challenge. According to the line of thinking that Blossfeld represented, the status of the “scholar” was not anointed by the state nor defined by the traditional attributes of social estates. Instead, his status derived from and was intrinsic to the type of knowledge the physician possessed (“science” broadly defined); in keeping, the social status this knowledge conferred to the group who possessed it was inalienable and governed by its own set of rules, as well as being independent from political whim or the entrenched mechanisms of the estate system. This “special aristocracy,” Blossfeld explained “is maintained not by great birth, riches, and other outward distinction—but on the strength of its internal value.”<sup>133</sup>

In his depiction of these new criteria, Blossfeld brought the physician’s social status into alignment with his procedural status. This transition flowed easily; however, the implications were not small. On the one hand, Blossfeld’s depiction of forensic medicine to young law students simply reflected the accepted, valorized place of medicine in contemporary legal procedure and administration of justice. On the other hand, by extrapolating these same proportions from the procedural setting to the broadest social level—Blossfeld posited radical, new criteria for ascribing social status and influence; and moreover, one that elevated physicians and their form of knowledge to a central, indispensable, and powerful place in the state apparatus and enterprise. “Only by this system” of a special aristocracy “[can] science contribute to order—the fundamental element of the state.”<sup>134</sup> It seems Blossfeld was well aware of the strong and multiple implications of his depiction; he quickly defused any potential alarm, adding that “Science submits only to God, the Church, truth, and the highest authority [*vlast*’]; its activity can never be disgraceful; true enlightenment was never the cause of political state revolutions.”<sup>135</sup>

But physicians did not view themselves as executing this special function alone; the third theme was that physicians viewed jurists as their partners in this lofty enterprise. According to this vision, physicians and jurists were co-conscripted and mutually dependent in their service to the inextricably linked and unified goals of jus-

tice, order, and the monarch. The relationship was necessarily one of friendly cooperation, as neither of their tasks could be achieved without the assistance of the other. “Both [the jurist and physician] together, considering the subject of the investigation from two different angles, interact with each other to achieve the final goal—justice.”<sup>136</sup>

As furtherance and reflection of this partnership, Kiev professor Leonov was particularly proud of the joint manner in which forensic medicine was taught to *both* medical and legal students, together, at his university. “It is consoling to see that in our vast fatherland, forensic medicine is not constrained by only one direction.”<sup>137</sup> In this way, Kiev’s institutional-disciplinary arrangement brought together the two different tracks by which forensic medicine was taught and conceptualized in Russia. As described by Leonov, it either followed a “medical” direction—as taught in other universities and the Medical-Surgical Academy; or strictly a “legal” one, in Schools of Jurisprudence and lycées. “In our University,” Leonov said with esteem, both tendencies are combined into one completely “theoretical-practical, medical-legal” direction, which comprised the main subject of the Department of State Medicine at the University of St. Vladimir. Bringing together jurists and physicians at such a formative stage, under this “all-encompassing direction” could only strengthen the partnership and its fruits. “One should,” he added, “anticipate the most favorable consequences in its application to practice.”

Leonov envisioned the mutual relationship of jurists and physicians in the broadest of terms—not limited to court mechanics, but as part of a broader social purpose. The physician teamed up with jurists in resolving the fundamental issue that underlay social order and defined the individual’s experience within that order. The physician “satisfies” the jurists’ questions to determine

the right of a person ... to humanity and individuality [*lichnost*]; and to primogeniture and seniority; to determine the right of the person according to age, sex and his [physiological/biological] functions [*otpravlenie*]; to investigate his physical and moral life; to discover illnesses that are simulated,

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concealed, and those that preclude [legal] responsibility; to explain the causes of violent death in its different forms; and to explain intentionality of crime.<sup>138</sup>

It was in this expansive manner, Leonov explained to his students, that the physician assists the jurist. But the relationship was not one-sided. The jurist, reciprocally “looks after” the physician and his responsibilities. Having an understanding of forensic medicine, the jurist could indicate to the physician those “appearances” that are essential to the case and its resolution.

Indeed, this conception of friendly relations was easy to maintain in the absence of any face-to-face contact between the two groups in practice.<sup>139</sup> This was true in both institutional settings in which physicians performed forensic medical work: either in the capacity as state physicians working directly with the courts, or as professors in the university setting.<sup>140</sup> And to be sure, physicians did object to the presence of those non-medical officials—the police—with whom procedure compelled them to interact in the course of their forensic duties.<sup>141</sup> This interaction with police was so bothersome to physicians, that their objection in at least one instance took the form of a direct request to the highest administrative reaches to change the rules. The Kazan Academic Circle (*Uchebnyi Kazanskii Okrug*) sent a dispatch in 1835 to the Medical Council, asking that professors of anatomy and forensic medicine be allowed to conduct their forensic-medical investigations in the absence of police *chinovniki*. (The Medical Council flatly rejected this request.)<sup>142</sup> Recognizing and notwithstanding the fact that the blissfully cooperative relationship between jurist and physician was an idealized notion—enabled by practical circumstances—the main point here is that physicians *perceived* themselves as partners with and allies of jurists, whose occupational pursuits were conjoined and administratively interlocking.

In this way, the common administrative purpose of medicine and law that had bound the two spheres since Peter’s reign at the highly structured level of law, regulation, and procedure was reproduced in physicians’ perception of their role and relationship to jurists. This perception was passed down to the “crossover” gener-

ation of physicians through university teaching and texts (among other channels) by professors of forensic medicine who had developed their view under the procedural structures of the inquisitorial system. The medical and legal students sitting in those lectures would soon (in two decades' time) find themselves facing one another in the open courtroom, under the new adversarial conditions of the judicial reform. However, this pre-reform relationship of physician and jurist was not the only alignment to be skewed by the 1864 judicial statutes. The judicial reform also decoupled—at least in theory—the ideal of justice from the state. In the chapters to which we now turn, we will examine the new ways and processes by which these various elements realigned themselves under the tensions produced by the drafting, enactment, and implementation of the reform.



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## CHAPTER 2

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# On the Cusp of Reform: Making the Expert Scientific

In the period of the great reforms, a radical change took place in the medical occupation by responding to the question of evidence. The abrogation of inquisitorial procedure left a vacuum regarding the legal significance of medical conclusions. Physicians responded to this change by redefining their forensic role in line with the methodological ideals and epistemological impregnability of science.

This shift had five main implications. First, it suggested a new justification and means for immunity from legal challenge, to replace the previous “procedural immunity” that the inquisitorial system had afforded. Second, with regard to securing legal weight for physicians’ conclusions (in the absence of the former rules of proof), it fulfilled the new criterion of “persuasiveness.” Third, it implied an ideological break from the single sphere of activity physicians had shared with jurists, against whom they now had to defend themselves and their conclusions. Taken together, I argue that these objectives represented and served a broader effort among physicians to retain a traditional mechanism for exercising social influence and occupational authority—that is, through the levers of state institutions.

However, coming to terms with these various issues does not mean the medical occupation coalesced into a homogenous body of opinion. The fourth topic examines the fault lines within the medical occupation that this transition revealed. And fifth, this chapter attempts to demonstrate how, in the Russian case, the notion of the “scientific expert” (as a source of public and legal authority) co-

developed and was inextricably linked with the shaping of legal institutions and procedures themselves.<sup>1</sup> It traces how physicians redefined their forensic-administrative role in response to the impending judicial reform. This transformation, I argue, gave birth to a new category of person in the Russian context—the scientific expert. In conclusion, I consider this turn to science and its implications within the broader climate and agenda of reform at mid-century. By demonstrating how reformers within the state shared a broader orientation with the so-called “alienated intelligentsia,” this chapter suggests that the gap between state and society was not as great as usually portrayed.

An appreciation of these changes can best be understood if we refer back to the past. Preliminary to examining these topics, it is important to deal with the question of a radical break with the past, and the intellectual preparation that preceded these changes.

### A SINGLE SPHERE: EMPIRICIST BEGINNINGS

Procedure in pre-reform Russia created a bond, not a barrier, between physician and judge. As noted in Chapter 1, their shared sphere of activity reflects an empiricist philosophy that itself emerged in the late sixteenth and seventeenth centuries, and took shape in—and in turn shaped—the fields of medicine as well as the new natural philosophy (science) and the new science of law. In her illuminating study of seventeenth-century intellectual life, Barbara Shapiro has described the reorientation of various learned fields in the direction of empirical inquiry, based on experience and particularities—as opposed to philosophic inquiry as the source of knowledge about the world.<sup>2</sup> The other distinctive feature of this period, Shapiro argues, was a growing commonality of approach to matters of fact in terms of degrees of probability and certainty. As she demonstrates, this new probabilistic approach to questions of evidence and proof permeated every aspect of intellectual life, including natural philosophy and law.<sup>3</sup>

While scholars have examined the effects of these intellectual tendencies on the early development of different fields of study, what has not been considered is the role that this empiricist orientation had on the development of legal procedure that also emerged in this period, and its implication for the physician's role in that system. This broader intellectual context, and the overlapping orientations of medicine and law, sheds light on the original, interlinking role of physician and judge, the physician's status in Russian and Continental legal process, and the emergence of those procedural structures that sustained this status and relationship. The physician's court-related function emerged at the intersection of these interrelated traditions. As the following section discusses, the interrelationship between the legal and medical spheres exhibited three fundamental characteristics. First, the physician entered the judicial process as an extension of the judge and judicial activity. Second, the jurist and physician shared a single sphere of activity. And third, the basis of this shared sphere was the activity of "viewing." As the "eyes of the judge," physicians were responsible for detecting, via their skilled vision, "appearances" and "signs." As a consequence of these factors, no ideological distinction was drawn between physician (medical sphere) and jurist (legal sphere).

Seeing was believing. According to scholarly proof-theory, the material traces of a crime had to be perceived personally by a judge. Anything less reliable than an unmediated judicial "view" was legally insufficient to prove that a crime had been committed.<sup>4</sup> In both Continental Europe and Russia, before the courts called upon physicians to examine bodies and wounds—that is, to help establish the *corpus delicti*—it was judges who examined all material traces of the crime, including those that pertained to the body.<sup>5</sup> Preliminary investigation into an alleged crime was highly formalized; the judge visited the scene of the crime, in order to proceed "*à la vue*," and immediately recorded his findings in a report.<sup>6</sup> The roots of this system of formal proof via judicial inspection date back to medieval European precedents.

As in medieval Europe, so too in early modern Russia. Because Russia made the transition to formal forms of proof later than

European countries, it is fitting that the judicial inspection also appeared later.<sup>7</sup> One gleans the existence of this practice of judicial inspection in Russia, even though the early modern procedural framework in which judges operated was not standardized, and was at best, a patchwork of practices sketched out in law codes (1497, 1550).<sup>8</sup> As historian John LeDonne has summed up, “there was no formal code of judicial procedure, even by the eighteenth century.”<sup>9</sup> Notwithstanding this farrago of legislation and practices, we do know that in this period the judge played the role of investigator in investigatory suits, actively seeking out evidence;<sup>10</sup> moreover, there was increasing judicial preference for more objective evidence (documents and individual eyewitnesses).<sup>11</sup> Precisely when the judicial inspection of material traces began, much less as a regular practice, it is difficult to pinpoint. However, as Soviet historian S.V. Shershavkin tells us “ancient [*drevnyi*] Russian law included punishment for inflicting bodily injury, and scholars of Russian law consider that the examination of bodily injuries was conducted by the judges themselves.”<sup>12</sup>

One case from 1697 illustrates this practice. Several drunken peasants at a tavern got into a fight, which led to the death of one of them. In the investigation documents, the judicial inspection of bodily injury is mentioned on several occasions. For example, “Upon *osmotr* [inspection], it turned out that the head [was injured] in two places, blood ran, the left eye was [injured]. . . .”<sup>13</sup> In addition, one of the participants in the fight testified upon questioning that his ear was bitten; addressing this point, the document read, “Upon *osmotr*, it turned out that in one place [of his ear] it was bitten.” In these *akts*, the judicial personnel described in detail all wounds and injuries found on the “viewed and designated” location.<sup>14</sup> As crude as these examples may be, they are significant insofar as they indicate that judicial personnel conducted personal inspections of bodily injuries, often in great detail, before physicians formally entered the process—as in other European countries at that time.<sup>15</sup>

In Continental Europe and Russia, physicians entered the legal process as an expert variant of this judicial inspection. When the crime in question concerned the human body, physicians and

judges shared the examining function (*osmotr*). In Europe, the transition from judge to physician dates to the medieval period. What remained constant across this transition from judge to physician was the centrality of “viewing.”<sup>16</sup> The physician, with his skilled vision, became the “eyes of the judge.”<sup>17</sup> When and if the facts in question required technical knowledge, the establishment of the physical fact of the crime (*corpus delicti*) was conducted by means of reports of physicians, surgeons, and other experts. No other proof as a rule was allowed.

This judge-like authority was contingent upon and confirmed via oath.<sup>18</sup> In Russia, where all state physicians were obligated to serve the courts in their forensic role, the judicial oath—which conferred judge-like status—was folded into (and substituted by) their service oath, taken upon entry into the state service. As professor Gromov instructed in his 1832 textbook, “If the physician is in State service, then he does not have to confirm his official testimony [*svidetel'stvo*] each time with an oath; those physicians who are not in State service are required to do so in accordance with the 1829 Instructions.”<sup>19</sup> Through this blending of administrative and judicial matrices—something unique to Russia—judge-like authority was part and parcel of the occupational identity of all state service physicians.<sup>20</sup>

## APPEARANCES

The visual emphasis of forensic medicine's origins as a judicial activity was consonant with the field's roots as an academic activity. As the preceding chapter discussed, anatomy was the intellectual progenitor and disciplinary sibling of forensic medicine, and the two shared much in common.

The heart of anatomy was immediate visual perception. As a founder of pathological anatomy wrote of anatomists, “They are painting a picture, rather than learning things. They must see rather than mediate.”<sup>21</sup> Central to anatomy, and the field of patho-

logical anatomy that grew out of it in the first quarter of the nineteenth century, was an almost exclusive emphasis on direct sensory perception.<sup>22</sup> This position reflected both a philosophical stance, of the eighteenth-century French ideologues, and a program for medical investigation and clinical activity. Certainly, faith in the reliability of the senses was not new, either in general or to medicine. With immediate roots in eighteenth-century empiricist philosophy, and more distant lineage in a hallowed tradition of clinical description-as-explanation dating back to Hippocrates, this new emphasis on viewing rejected a priori theorizing, and instead urged the importance of direct medical observation. Foucault has depicted this late eighteenth-century orientation in more invidious terms as the “empirical gaze,” and identifies pathological anatomy—or as he calls it, “the technique of the corpse”—as the seat of an epistemic shift at the end of the eighteenth century, when “medical rationality plunges into the marvelous density of perception,” making possible a scientifically structured discourse about the individual.<sup>23</sup> Whether or not they were complicit in this enterprise that Foucault describes, authorities in forensic medicine certainly shared the same valorization of immediate perception, and disdain of mediation, as their anatomical colleagues.<sup>24</sup>

These shared origins were consummated legally. Not surprisingly, the language of the laws that regulated and defined forensic-medical activity reflected the overlapping traditions that spawned it. In these statutes, the objects and products of the physician’s investigation are described as “appearances” and “signs.” While these terms correspond to the intellectual approach of pathological anatomy, with its emphasis on direct sensory perception, they also overlapped and dovetailed with the intellectual matrix of the inquisitorial procedure, with its system of “signs” and “indications.”<sup>25</sup> In the 1828 Rules of Forensic Medicine, one article reads: “The historical part of the inspection must itself include a thorough description of the entire course of the investigation, with all the *appearances* that are found in the body and *signs*, in the exact order as they are discovered....”<sup>26</sup>

Having a linguistic inertia of its own, this language carried into

the 1864 judicial reform statutes.<sup>27</sup> The formal names of the physician's written testimony (which are relevant for reasons which will become clear) also reflected this manner of thinking. The format of physicians' written testimony, borrowed from the Austro-German-Prussian model, consisted of the "historical part" and the "opinion."<sup>28</sup> What the Russians called the "historical part" (and Austrian law referred to as the "descriptive" part) was just that, a descriptive inventory of "signs" and "appearances."<sup>29</sup>

What is significant here is that physicians made no overt ontological claims or presumptions of fixed truths in their descriptions of "appearances"; nor were such claims embedded in the language of "signs" that emerged as the logical product of the visually-centered activities of the judicial inspection and medical investigation. In inquisitorial process, "signs" were not "proof"; they were a distinctly lower order of evidence, and did not carry the certainty necessary for conviction. In medicine, as Ian Hacking has pointed out, the "signs" of medical phenomena might be read, and predictions or diagnoses made, but none of which would have claims to certitude.<sup>30</sup> Put another way, Russian physicians were not, in their own right, in the business of producing facts. From the emergence of forensic-medical practice up to the eve of the judicial reform, "appearances" and "signs" were the "stuff" of forensic medicine. Facts were not.

This is not to say that "facts" did not exist or play a role in the inquisitorial system. On the contrary, the civil law system, like the common law system, revolved around the notion of legal facts.<sup>31</sup> As we have seen above, under the inquisitorial system, the rules of proof determined the legal weight and value of all testimony; as such, it was the purported rationality of these rules which determined what would and would not "count" as a fact, and be endowed with the irrefutable certainty that went with it. It was through this system of proofs, as Crawford points out, that courts "got at the truth."<sup>32</sup> Physicians' findings, though valorized and given the imprimatur of certainty by the rules of proof, did not in themselves—independent of the "rationality" of the inquisitorial system—carry the status of fact, nor did physicians make such claims.

It simply was not an issue for physicians, and this made sense: the procedural architecture of inquisitorialism precluded any challenges from the legal side as to the validity of medical testimony. No epistemological claims were necessary, because there was no one against whom physicians had to defend themselves or the validity of their answers. Under the inquisitorial system, physicians had nothing to prove—they *were* proof.

In the process of adapting to the coming procedural changes, physicians redefined their role and work according to the language of science. In this process, physicians became producers of facts, and defined their work as ideologically distinct from the judicial sphere of activity, which they once shared. But it is not enough to say this shift happens. Where does this transformation come from? Why does it happen? But first, how did they see what was coming?

### INTELLECTUAL BORROWING

On the cusp of the judicial reform, educated Russians, including physicians, were keenly aware of—and preemptively borrowed from—the experiences of their foreign counterparts who had undergone similar legal transformations in an earlier period.<sup>33</sup> That physicians responded to the not-yet-arrived judicial changes may sound like a contradiction, but it is nonetheless a familiar one in imperial Russian history; it is in keeping with the oft-cited inclination of nineteenth-century Russian activists and intellectuals to skip over stages traversed by Western counterparts in the working out of native social, political, and legal questions. On the eve of the judicial reform, the question of the physician's authority under the new legal system-to-be was one such issue. The intellectual influence of European experience affected physicians' "gearing up" for the reform, that is, all the major issues that I introduced in the chapter's first pages, and will discuss below. Before proceeding to analyze these changes, it is necessary to examine the intellectu-



al preparation and mechanics of cultural borrowing that preceded and spurred them; the topics that follow include foreign travel, language study, and foreign textbooks.

Russian physicians had several means available to become familiar with their Continental counterparts' experience with the transition from a written, inquisitorial system, to open, oral adversarial proceedings. And within that transition, most significantly, they learned of the shift from formal rules of proof to the free evaluation of evidence. In the natural sciences and medicine, exposure to foreign ideas and institutions was a staple in a student's education, either by virtue of foreign textbooks or academic trips abroad. Historians who have written on the development of separate scientific disciplines in Russia have each indicated, with respect to their individual disciplines, that travel abroad was common and even essential to career advancement.<sup>34</sup> Foreign study was encouraged and rewarded with plum academic posts; *kandidats* were groomed for advanced degrees and teaching positions via study abroad.<sup>35</sup> The central government steadfastly recognized the practical value of natural sciences and medicine as a means for meeting broader state objectives, such as industrialization and the improvement of public health and welfare.<sup>36</sup> At the same time, top government officials also recognized the value of Western study for the development of these fields and training of its teachers and practitioners. These imperatives translated into educational policies that gave special dispensation to the natural sciences and in particular medicine, against a backdrop of changing, sometimes restrictive education policies and retreat from Western thought in other areas.<sup>37</sup> As a result, foreign texts and/or training abroad remained part of a physician's education from the founding of Russia's universities in the early nineteenth century through the remainder of the imperial period.<sup>38</sup>

Medicine, especially, was spared from the state's restrictive measures. General histories of education in the Nicholaevan period tend to focus on the conservative nature of university policies; this interpretation, in large part, stems from the authors' focus on academic autonomy and freedom, and student revolutionaries.<sup>39</sup>

Looking at the medical faculty, one finds a different picture. Even during the period of conservative educational policies under S.S. Uvarov's replacement, Minister of Education Prince P.A. Shirkinskii-Shikhmatov (1848–1853), the government was lenient in its treatment of medicine, even in relation to the scientific disciplines. The medical faculty was singled out as exempt from enrollment limitations in the 1849 restrictions on student enrollment and study abroad.<sup>40</sup> Weighed against state concerns over student unrest and desire for greater nobility enrollment, this exemption can be explained, in large part, by the state's priority to increase the number of physicians—and thus medical enrollment; this priority emerged and solidified against a backdrop of wars and epidemics that confronted the central government with devastating force in the first quarter of the nineteenth century.<sup>41</sup> The Napoleonic Wars, war with Turkey in 1827–1828, and then the first cholera epidemic of 1828–1832 exposed critical needs. These circumstances proved a powerful fillip towards an active period of medical reform under Nicholas I.<sup>42</sup> The state's effort to increase the number of physicians, and promote foreign study as part of medical education, meant that the flow of young Russian physicians to the West continued steadily across the nineteenth century. But these trips were not “independent studies,” shaped by the individual physicians' interests. Instead, they were shaped by the needs of the department—very often dictated from above—and prior to their travel, each young physician received instructions for his studies.<sup>43</sup>

Departments of forensic medicine, in capital cities and provinces alike, were no exception. No European center or major name in the field was overlooked as a destination. Career patterns from Kharkov University offer typical examples that testify to this practice. Chair of Forensic Medicine, I.A. Sviridov, was sent abroad in 1836–1837 with a “scientific goal” to study forensic medicine, medical police, toxicology, and psychiatry, which he did in Berlin, Bonn, Munich, and Vienna.<sup>44</sup> His successor, A.S. Pitra, shortly after being confirmed as an adjunct, was sent abroad for “improvement in sciences” from 1856–1858. Besides training in Vienna,



*Operating Hall at Obukhovskaia Hospital. Russia was part of an international world of medical knowledge and practice. This contemporary operating hall in St. Petersburg in the 1880s shows that elite Russian practitioners were part of this milieu.*

Photograph by Ivan Vasilievich Boldyrev.  
Courtesy of the Russian National Library, St. Petersburg.

Leipzig, and Berlin, Pitra spent most of his time in Paris, where he studied with leading medical figures of the day—medical legislation and forensic medicine with Tarde, and hygiene, medical police, and epizootology with Bouchard. Foreign assignments were not always limited to scientific study. In this same period in the capital, E.V. Pelikan (1824–1884), chaired professor of forensic medicine at the St. Petersburg Medical-Surgical Academy (and later chairman of the Medical Council) was sent abroad for a sixteen-month trip, with instructions to, among other things, “study on location the contemporary condition of forensic-medical codes and instructions to physicians in different European states, especially France, Bavaria, and Prussia, trying during this time to delve into their application ... and actual practical significance in Civil and Criminal Proceedings.”<sup>45</sup>

Clearly, foreign languages were a prerequisite for accessing foreign ideas. In eighteenth-century court circles, foreign languages had been the privilege and symbol of a noble upbringing, but in nineteenth-century universities, European languages were valued as a practical tool and central to medical education.<sup>46</sup> By the mid-1850s—with the post-Crimean relaxation of educational restrictions and concomitant upsurge in study abroad—the renewed premium on and access to current Western scientific thought was reflected in changing rules toward foreign languages in the medical department. Decisions about integrating European languages as “working languages” in the medical department came from the top down. The university council, in the academic year 1856–1857, required that all matriculants have a thorough knowledge of one of the “modern” (*noveishii*) languages.<sup>47</sup> Beginning in 1857 students were allowed to conduct their oral “disputes” at the defense of their dissertations in one of the “widely used” European languages, besides the usual Russian or Latin.<sup>48</sup> In 1863, the same “freedom in languages” was permitted for the submission of dissertations for an academic degree, that is, students were allowed to write their dissertations not only in Latin and Russian, but also “in all of the modern European languages.” The medical faculty, for its part, wished to take this one step further, and extend the same “freedom” to the written answers on the doctoral exams.

Apparently, there were limits; the faculty's request was refused.<sup>49</sup> Given the ascendancy of the German medical sciences in the nineteenth century, ability in that language was regarded as particularly important, as seen by the fact that German was a required course in the medical curriculum.<sup>50</sup> In the mid-forties, at the height of the Nicholavean period, university students were offered courses in German, French, Italian, and English. The premium that the state put on language skills in general and facility with foreign texts is witnessed by the fact that under the student's graduation requirement to write two essays, one could be substituted by a translation!<sup>51</sup>

Foreign textbooks provided another channel for learning about changing legal procedure. Foreign texts had been a central part of medical education since its widespread introduction at the turn of the century, and German texts, in particular, played a distinctly large role.<sup>52</sup> To be sure, this was true for other medical subfields, and the influence of the German methods and scholarship was by no means limited to Russia, thanks to the nineteenth-century dominance of the German research tradition in the medical sciences.<sup>53</sup> As Charles Rosenberg has pointed out, the German-speaking world offered a potent model of training and practice to young American physicians, as it offered "the most advanced and self-consciously 'scientific' training in clinical medicine."<sup>54</sup> However, within medicine in general and Russian medicine in particular, German influence was preponderant in forensic medicine, for reasons specific to the field.

Given that forensic medicine was based on other medical sciences, the development of German medical science had a positive influence on forensic medicine as well. But Germany's unmatched productivity in this forensic field began earlier than the nineteenth century. As historian of medicine Erwin Ackerknecht has noted, "there was in Germany during the 18th century an almost uninterrupted production of treatises on legal medicine."<sup>55</sup> Germany's strength in this field, and that of Continental Europe more broadly, can be traced to inquisitorial methods of investigation and the corresponding procedural system of review that emerged in the early modern period. Catherine Crawford points to the Roman-

canon provision for review of judgment as the main source of Continental prolificacy in forensic medicine.<sup>56</sup> It was this official system of assessment by professors of medicine, Crawford argues, that explains the scholarly nature and dominance of German publications in the field of forensic medicine in the seventeenth and eighteenth centuries.<sup>57</sup> For this combination of reasons, there was a steady supply of German forensic-medical texts ready for export. With regard to demand, as we have seen, Russian medical institutions and regulations were based directly on those of Prussia; consequently, in a field like forensic medicine, where its practice was contingent—more than other medical fields—on institutional structures and legislative regulations, the texts of German-speaking countries applied closely to the Russian context. The roots of Russians' reliance on and embrace of German forensic-medical texts—particularly those of Austria, a center of forensic medicine—were so deep that they withstood (or transcended) revolution and war; the tenacity of this tradition is illustrated by an anecdote from the Second World War, “[w]hen the Russian occupying forces entered Vienna in 1945, an accompanying Russian forensic physician visited the library of the institute [of forensic medicine]; the next day he brought Hofmann-Haberda’s textbook of forensic medicine ... published in 1835.”<sup>58</sup>

One textbook that proved most influential in the Russian setting was A. Shauenstein’s *Textbook of Forensic Medicine*, published in Austria in 1862.<sup>59</sup> In 1852, Shauenstein had been named assistant to the Chair of State Medicine at the Vienna Medical School, and “quickly became its true representative in the leading scientific forum in Vienna, the Society of Physicians.”<sup>60</sup> His textbook remained the standard work on the subject in Austria until the publication, two decades later, of the textbook by Josef von Maschka. The characteristics that led to the dominance of Shauenstein’s text in Austria also made it stand out in Russia; but in the Russian case, it was the timing of its publication there (1865), on the brink of the judicial reform, that contributed to its particular resonance and relevance.<sup>61</sup> Shauenstein’s was the first text of forensic medicine to be published in Austria since its revolutionary

period. Moreover, enough time stood between its writing and the changes spawned by this period that Shauenstein was able to base the text on the reformed judicial procedure (soon to be inaugurated in Russia), as well as the new Austrian penal code of 1850. In addition, almost made-to-order for the avidly comparative-minded Russians, Shauenstein referred comparatively to relevant legislation of the German states, England, and France. And finally, the text conveniently pulled together in one place the ideas of the day's leading representatives of forensic medicine—always useful in a country with limited resources for publishing, and a chronic scarcity of texts.<sup>62</sup>

Shauenstein was self-consciously evenhanded in describing what the new oral, adversarial system entailed for the physician, showing both the “brilliant” and “seamy” side of his new role in the courtroom. This latter stemmed mainly from a complete lack of experience with and preparation for the challenges of oral presentation and adversarial questioning. “There is nothing more dismal,” Shauenstein wrote, “than to see an *expert, a representative of science*, when he is seized by timidity and indecisiveness, confused in contradictions ... and searches but does not find the appropriate expression for his thoughts.”<sup>63</sup> The Austrian author found it equally bleak when “before the court are presented as many different opinions as there are experts invited for the given case, when during the attempt of the latter to come to agreement, the scientific argument spills into endless blathering....” Knowledge no longer sufficed. As Shauenstein explained, “In the courtroom, the expert must bring not only fundamental knowledge, but also the ability to reveal this knowledge, and by this secure that influence on the judge, which he can and must render on him.”<sup>64</sup>

Shauenstein's frank depiction of the “seamy side” of the new procedural system caused an immediate shift in tone within Russian forensic medicine. No more the cheery and confident self-assessments of their field, similar to those made by its leading representatives in the 1830s and 1840s. This former optimism is reflected vividly in the words of Leonov, in his 1845 lecture: “At this time, native forensic medicine has its own principles [*dogmaty*], free of

suppositions and empty daydreaming. Leaning on solid ground, on positive laws, it pours light back on the subjects, from which it itself arose. Adjoined with positive law, it by itself comprises, so to speak, a Code of formal/official [*formennyi*] laws; and being appended to the various individual cases of the people's daily life [*narodnyi byt*], it clarifies the law itself in its innumerable applications."<sup>65</sup>

Shauenstein's depiction abruptly brought an end to this idyll. In his introductory essay to the Austrian text, its translator, physician I. Chatskin, made an about-face and rejected this received picture, finding it jarringly incompatible with a modernized legal system and its new demands.

In the textbooks of forensic medicine published in Russia, in introductory lectures about this science that are conducted up to now, one notices—thanks to the initiative of the honorable Gromov—an enchantment with the rapid successes and unusual flourishing of forensic medicine in Russia. The declaration of this complete satisfaction is usually accompanied by the listing of several tens of reasons that would explain this flourishing. But in reality—we are so little able to arouse such satisfaction, the only question we can pose to ourselves is, whom can we count on to get rid of these statements?<sup>66</sup>

Chatskin recognized the advantages of reform, but in light of Shauenstein's text, he issued a warning to his fellow Russian physicians on the eve of judicial reform. "The judicial reforms of 20 November [1864] promise more favorable ground for the flourishing of Russian forensic medicine, and therefore even greater responsibility lies upon our future experts. In order to be prepared to carry this heavy responsibility, above all, one must acknowledge to oneself and to others that we are not prepared for this."<sup>67</sup> In the face of this challenge, a subtle transformation, but one with profound consequences, was set in motion.



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SEPARATE SPHERES: MAKING  
THE EXPERT SCIENTIFIC

*“Da mihi factum et dabo tibi jus”*

In 1870, four years after the new courts opened, Prosecutor (*prozektor*) of Pathological Anatomy Dmitrii A. Kotelevskii opened his introductory lecture on forensic medicine to students of the legal faculty at Warsaw University with this tradition-laden quotation.<sup>68</sup> Translating this adage into Russian for his students, “give me the fact, and I will give you justice,” Kotelevskii situated forensic medicine within the civil law tradition and evoked the intellectual panache, legitimacy, and almost mythic origins of Roman law. “From this tenet that is found in the edicts of Roman magistrates,” he explained, “it is clear that for the application of law and justice [what] is necessary above all [is] the fact.” And the “fact,” as he depicted throughout the course of his lecture, was the province of the physician.

This was a distinct change from the lectures of three decades prior, when there was no mention of facts. As we saw earlier, physicians had not been the producers of facts. Now they were. The remainder of this chapter explores one of the processes by which this transformation took place, in relation to the intellectual influences discussed above. In this regard, it analyzes the mechanism of cultural borrowing more closely; for exposure to foreign ideas alone does not explain change. The following discussion examines how and why physicians adopted the foreign notion of “expert” as a representative of science, and adapted it to concerns and tensions within the medical occupation at the middle of the century. It considers, as part of this process, how this reconceptualization of the physician’s forensic role was diffused and propagated on Russian soil. In doing so, it seeks to demonstrate how these changes were a practical response to the impending reform, and part of a broader effort to preserve a traditional source of authority within institutions that were undergoing modernization.

German textbooks were particularly well-suited for transmit-

ting procedure-related information. As representatives of this field often bemoaned at the middle of the century, forensic-medical textbooks did not follow any standard organization, and authors divided the subject in various ways; this in turn reflected the hybrid nature of the field and conflicting views over the very definition of it.<sup>69</sup> As one German physician put it in 1861, while one authority speaks of forensic medicine as “completely not medicine, but only jurisprudence illustrated by medicine,” others, such as Orfila and Devergie (from France), describe it as “the art of applying knowledge that is acquired by natural and medical science;” still others, like Germans Friedreich and Casper found it to be “a completely separate science.” (In the end, the characterization that the German commentator found most pleasing was forensic medicine as “a monographic reworking of separate parts of medical science.”)<sup>70</sup>

Notwithstanding this grab-bag of definitions that coexisted across and within national boundaries, German texts typically followed a uniform organization, and were divided into two main sections: “general” (*obriadovyi*) and “special” (*chastnyi*) parts.<sup>71</sup> The “special” part contained the substantive medical topics, the “general” (and shorter) part, contained the procedural rules, relationships, and legal definitions which guided the physician. Because forensic medicine was itself a component of the Roman-canonical tradition, this structure of forensic-medical texts mirrored the organization of Continental legal scholarship.<sup>72</sup> This “General Part,” a feature of German legal science, thus provided a compact vehicle for introducing to Russian physicians the new procedural relationships and statuses that came into being after the German judicial reform.<sup>73</sup>

Shauenstein’s “general” section, in keeping with the German tradition of legal scholarship, described the procedural relationships and definitions that inhered regardless of circumstances, and structured the physician’s activities and status. The subject headings in this section included: “about judicial evidence by means of knowledgeable people (experts),” “invitation of experts,” “selection of expert,” “subjects of the expert’s activity,” “forensic-medi-

cal testimony (*svidetel'stvo*) and its parts,” and “the activity of the expert during the concluding investigation of the case by the court.”<sup>74</sup> Significantly, however, because the text was written in 1865 (almost two decades after the German judicial reform) the relationships that it described were those resulting *after* the transition from the inquisitorial to adversarial system—that is, the shift from written procedure with its system of rational proofs, to open proceedings with free evaluation of evidence based on moral conviction.<sup>75</sup> Thus, when Russian medical professors, students, and practitioners—in capital and province alike—turned to this Austrian text for its medical content, they also received a crash course in procedural reform and its implications for physicians’ status and authority in the new courts. In this way, Shauenstein’s textbook—thanks to the timing of its publication and manner of organization—offered Russian physicians a concise and accessible “preview” of things to come.

Examining how the subject of forensic medicine was taught to legal and medical students on the eve of the judicial reform’s implementation sheds light on how the new procedural system and relationships—and new image of the forensic physician—was introduced to the next generation of physicians and jurists. Courses at the St. Petersburg Medical-Surgical Academy and Moscow University law faculty offer particularly striking examples. As primary documents, these course materials were hand-written in small, tight longhand.<sup>76</sup>

In St. Petersburg, professor Ia.A. Chistovich’s “program” for his course on forensic medicine was straight out of Shauenstein. The course material was a handwritten copy of the Austrian text, with corresponding study questions for each lesson’s chapter /topic.<sup>77</sup> However, Shauenstein is not cited anywhere by the transcriber, in fact, there is no attribution whatsoever to any source. Nevertheless, a close comparison of Shauenstein to the handwritten “program” at St. Petersburg demonstrates that the entire program was cribbed verbatim from Shauenstein. However, this was not rote copying, there was clearly discretion used on the part of the transcriber, and an assimilation of the material to Russian needs;

for the cribbing was done in a cut-and-paste style, with paragraphs and phrases mixed up and arranged differently from the original. What makes this cribbing so compelling is what did *not* make the cut. Although the transcriber rearranged the original content, a line-by-line comparison shows that the only elision was a passage stating that “although the physician had a judge-like status, in practice he was treated like a witness.”<sup>78</sup> This omission is significant in that it suggests a Russian aversion to any diminished legal status for the physician, in *principle*, even before the new courts opened, and practical experience intensified that stance. As Chapter 5 will examine, this aversion becomes widespread and the focus of polemics after the new courts open, fueled by broader dissatisfactions with the reform.

In this same period, law students were also taught forensic medicine based on the German model. In 1865, at the law faculty of Moscow University, the lecture read by physician V.A. Legonin was not a crib of Shauenstein, but had all the tell-tale signs of German origin.<sup>79</sup> Legonin broke with the standard Russian form of forensic-medical lectures of two decades prior (as illustrated by professors Leonov and Blosfeld in the preceding chapter)—that is, it was not a recitation of Russian legislation, culminating with praise of the tsar’s patronage of forensic medicine. Instead, in keeping with German form, it jumped right into procedural relationships, statuses, and definitions.

Besides being reflected in the lecture’s content, Legonin’s familiarity with the latest German texts is apparent from his sideline in translation work. His familiarity with German medical literature and facility with the language is clear from the roughly half dozen translations he produced from German, ranging in subjects from ophthalmology to medical police. Most significant among these, for our purposes, was his first publication, in 1858, which was the translation of a German text of forensic medicine.<sup>80</sup> Given his absence of practical forensic medical experience, and an 1859 doctoral dissertation on premature birth, this translation was likely the basis for landing his position as docent on the Faculty of Law of Moscow University. The early procedural contiguity between medicine and law was reflected also in the fluidity with which physicians moved

between the two faculties. Following the same academic path as Professor of Forensic Medicine Blossfeld in Kharkov (whom we met in Chapter 1), Legonin not only made the Faculty of Law his academic base, he would also serve as its dean later in his career (in the 1880s).<sup>81</sup>

Legonin's lecture was clearly geared to this moment of transition. The final section of the lecture was a section titled "Influence of the Public Court on the Development of Forensic Medicine." Under this rubric he drew from Continental authorities with prior experience and opinion on the matter. In particular, he recounted the words of prominent German jurist C. Mittermaier: "With the introduction of the jury court," Mittermaier is quoted, "more than any time the belief is confirmed that in the most important criminal processes the opinion of the forensic physician decides the fate of the defendant, and not rarely is the jury's verdict based exclusively on trust in the authority of the forensic physician."<sup>82</sup> For the first time in Russia's history, the weight and influence given to medical conclusions was no longer going to be an administrative reflex; for the first time, this influence would be tied to criteria specific to the physician—which begged the question: by what criteria would trust and credibility be established?

#### FROM APPEARANCES TO FACTS: A NEW IMMUNITY

The German depiction of forensic medicine, as transmitted through Russian lectures and course programs, altered the traditional conceptualization of the physician's forensic role in two fundamental respects. First, it defined the "essence" and product of the physician's work in the language of fact. This simple shift of terms was not without profound consequence for the relationship between physician and jurist. One by-product was that it carved out, at least in theory, a sphere of "immunity," which could not be challenged by jurists. Another, interrelated by-product was that it

created separate ideological spheres for the jurist and physician—defining each group’s intellectual method, and the type of information to which each group could speak, as fundamentally distinct. This was a significant break from the preceding relationship between judge and physician, and their single sphere of activity, which I have elaborated above. The second major redefinition concerned the weight and significance of medical testimony. What was its legal weight in the absence of the arithmetical rules of proof (which had assigned predetermined value to all types of evidence, including medical)? By what criteria would its weight now be measured?

In the world of the German forensic physician, facts abound. As Lorraine Daston has shown, by the middle of the century, the term “fact” carried a specific meaning, and was loaded with a unique weight and persuasive power. In short, it represented an unwavering truth about nature and carried the imprimatur of certainty.<sup>83</sup> “Facts” appeared in the language of the Austrian and German/Prussian statutes that regulated the physician’s forensic work, as well as the medical textbooks that taught it.<sup>84</sup> “Facts” did not wholly replace the language of “appearances,” but were incorporated beside it. For example, as Prussian law read, “the presiding [legal] official must state in his protocol every important proceeding of the [medical] experts, exhibiting in it *all that the external senses have taken cognizance of*, and inserting besides these *matters of fact*, also the result of the examination and opinion of the experts....”<sup>85</sup> This shift was not merely a matter of semantics. These terms, as used in medical textbooks, were operational. Most striking, Shauenstein used the terminology of “fact” *only* in the context of demarcating that which was off-limits to jurists. As he wrote in his textbook: “The judge cannot discuss the truth and accuracy of the factual part of the physician’s opinion.”<sup>86</sup> Shauenstein further reinforced the point, adding that “it would be a logical contradiction,” for it was “precisely for this reason that the judge turned to the expert, to form an opinion on that subject which he himself could not.”<sup>87</sup> The essential other half of this process of defining an exclusively medical sphere that jurists could not address was defining its foil, that is, that sphere in which jurists *could* operate. Thus, in the next breath

Shauenstein stated, “the judge can discuss the logical correctness [of medical conclusions].”<sup>88</sup>

By making this distinction between fact and logic, Shauenstein separated a self-contained, medical arena of activity that was inaccessible to jurists from a legal arena, restricted to questions of logic. This process divided the single sphere of activity that judge and physician had shared since the emergence of formal judicial procedure into two separate parts. Defining the segments of the physician’s work according to the opposition of fact versus logic—and defining the “factual side” as inaccessible to the judge/jurist—an ideological line was drawn between medicine and law.<sup>89</sup>

In his 1865 lecture at Moscow University, Legonin introduced to law students the same picture that medical students were presented in St. Petersburg (and everywhere else Shauenstein’s text was used). Like the Austrian textbook, Legonin delineated that which the judge could and could not discuss, and divided the spheres of physician and jurist according to the same categories of fact and logic.

The language of “fact” in forensic medicine, as imported from the Germans, described the substance of physicians’ work, and was also extended to dossier documents that represented that work. And in legal cultures based on written procedure, documents mattered. Quite simply, documents were the currency of inquisitorial process; it made a difference how each piece was identified. As we saw above, the first part of the physician’s testimony, in which he laid out his initial observations and findings, was called the “descriptive or historical” part. Under this new depiction, the “descriptive” part of the document was now not simply a description of “signs and appearances” but was, as Shauenstein put it, a report about “the facts collected by the expert”; accordingly he renamed it the “Factual Part,” or as Legonin called it, “objective/factual.”<sup>90</sup>

What makes this reconceptualization most striking is how it served as a means and justification for immunizing the physician’s testimony from legal challenge under the new procedural (adversarial) system. This renaming had a functional significance: the “Factual Part”—which at the same time was designated as the

“essence” of the physician’s work—was now, by definition, off limits to judicial critique or questioning. In his lecture, Legonin posed the question, “What does the judge’s checking [*kontrolirovanie*] of the physician consist of?” Answering his own question, Legonin hermetically sealed off the “objective” part of the physician’s testimony. To subject this part of medical testimony to scientific critique “is impossible,” he explained, without preliminary special and general medical education. Because the judge, of course, did not have the special training necessary to question the “objective” part, Legonin’s argument went, the physician’s word on the matter was to be taken as “fact.” This blanket of immunity covered the gamut of subject matter, from dissection, to mental condition, to bodily injuries. “To understand a crack in the skull, a wound on an individual ... special knowledge of medical science is required; and therefore the judge is required to look at it as on a *fact*.”

The impact of this redefinition was lasting. Despite its derivative nature, this new orientation between medicine and law solidified into a fixed and naturalized status under post-reform circumstances. The generation of physicians who received their medical education in the sixties, and were taught forensic medicine in the manner described above, reproduced this picture in their own latter century arguments to bolster the physician’s legal authority. As an example, one of the most outspoken advocates of medical expertise in the post-reform period, Kharkov city physician E.F. Bellin, for his own strategic purposes, reproduced the same fact/logic opposition, with the same operational value, explicitly drawing on the association of “facts” with science. As Bellin asserted in 1889, “The court can only discuss the ‘*formal* reliability’ and ‘logic’ (*logichnost*) of the [physician’s] conclusions, and not the ‘scientific reliability’ and fullness of the medical information.”<sup>91</sup>

In sum, physicians on the one hand and medical and legal students on the other, by virtue of Russians’ reliance on Austro-German texts, were introduced to a new lexicon that established new boundaries between jurist and physician. All of these shifts were by-products of the redefinition of the physician’s forensic work according to the language and ideals of science. It is beyond the scope of this study to examine the origins of this shift in those



German-speaking countries whose texts served as a model for Russia although this scientific orientation is in keeping with the fact, as discussed above, that German countries represented the most self-consciously “scientific” approach to medicine at the middle of the century. Speaking only for the Russian context, up to this point the physician’s forensic role—as it had emerged since the 1600s—was regarded as an extension of judicial activity, describing appearances as the judge had earlier, but with a more skilled eye. On the cusp of the judicial reform—between its enactment and implementation—physicians redefined themselves as operating within an exclusive, ideologically distinct sphere, where, instead of describing “appearances,” the physician produced impregnable “facts.” It was a sphere defined out of the practical reach and epistemological bounds of jurists.

#### FROM CERTAINTY TO RELIABILITY: A NEW CRITERION

As mentioned above, the impending procedural reform was pregnant with two immediate consequences for Russian physicians. First, the elimination of what I have called “procedural immunity” (that is, the absence of any legal challenge to the physician’s testimony due to the structures of inquisitorial procedure); and second, a change in the probative weight and status of medical testimony. We now turn to this second consequence.

As discussed in Chapter 1, the system of rational proofs, the lifeblood of the inquisitorial procedure, assigned a predetermined, arithmetical value to every evidentiary element; the value assigned to medical conclusions was great, and it was guaranteed. Besides having an unwavering value, medical conclusions also had the imprimatur of certainty.<sup>92</sup> As German legal scholar Mittermaier described, “Under the former secret, bureaucratic procedure of judicial proceedings, judges completely relied on the written comments of experts, appended in the form of an *akt* to the case, and if

there was no disagreement between these comments, then the judges considered the experts' conclusions not liable to the slightest doubt."<sup>93</sup> The automatic infallibility ascribed to physicians' conclusions was in keeping with the original rationale underlying the system of arithmetical values, that is, the "scholastic attempt to decide everything a priori."<sup>94</sup> With the abrogation of inquisitorial procedure, both of these elements that were germane to physicians—a fixed legal weight (the maximum and potent "full proof" status), and the presumption of certainty that went with it—also disappeared. The freshly imported adversarial system offered no procedural structures to secure the same privileged status for the physician. Instead, this procedural transition meant physicians' fall from infallibility. With the stroke of Alexander II's pen, ratifying the judicial reform, physicians' conclusions and form of knowledge became plebeian virtually overnight, lumped with every other type of evidence, its weight and influence to be determined, like that of any witness, by the jury's "free evaluation" and based on their "moral conviction."

\* \* \*

"Medicine," the great clinician Sir William Osler once observed, "is a science of uncertainty and an art of probability."<sup>95</sup> Clearly, he never worked under inquisitorial courts. Under the mechanics of inquisitorialism, medicine had been ascribed the status of certain knowledge, and as such, was granted full probative value and adjudicative leverage in kind. With the introduction of the English-style jury trial also came its threshold of "reliability," replacing the standard of certainty that underlay inquisitorial process. In the Anglo-American context, physicians—who had the legal status of witnesses—were likewise held to the same criteria; that is, they were expected to be "reliable" witnesses, with "reliable" testimony.<sup>96</sup> Back on the Continent, this shift in legal standard, from certainty to reliability, required a new way of looking at medical knowledge.

Stripped of the procedural structures that afforded and ascribed to medical conclusions an unquestioned certainty, medical knowledge was, in effect, laid bare. Under the former system, forensic

medicine was treated by jurists and physicians as a type of nomothetic knowledge that produced universal truths—a view which, understandably, could prevail under a judicial complex in which physicians' assertions were never directly, much less publicly, challenged. Indeed, this field of medicine offered the judicial system precisely that which it was geared for, that is, statements of certainty. In this sense, medicine and law evolved within a mutually-reinforcing “epistemic system,” if you will. The procedural reform threw this traditional manner of thinking about and within forensic medicine into a crisis of sorts, engendering an almost confessional reversal by physicians who lived through that transition. Consequently, physicians in Germany and Russia, in the years surrounding their respective reforms, made it a point to announce that medicine, and forensic medicine especially, offered knowledge about individual particularity rather than universal truths. Legonin, in his 1865 lecture to law students, also addressed this issue:

Authors, under the influence of the prevailing tendency, have tried to resolve all forensic-medical questions from the point of view of *absolute truth*; they did not want to take into consideration that forensic medicine, like practical science, deals only with concrete cases, that for this is important *individual facts*—but they looked at each subject abstractly.<sup>97</sup> ... But medicine can not fulfill [the criteria of absolute truth] due to the complexity of the human organism. Between cause and consequence lies a whole series of organic and individual particularities, upon which also depends [the fact of having] dissimilar results from one and the same causes in different people. The source of these particularities are the unknown-to-us vital characteristics of the elementary parts of the organism.<sup>98</sup>

But all was not lost. There was still a role for medicine in law, even after such an admission; for as Legonin explained to his students, the new evidentiary threshold was based on *degrees* of certainty, not the absolute certainty to which Russian physicians and jurists were accustomed:

[B]efore rejecting the legal value of forensic-medical opinions, one must know, to what degree reliability is necessary *in order to receive the character of legal evidence*, and whether or not legal reliability has the character of unconditional truth, and consequently [there is] no basis to demand this from forensic-medical evidence. Jurists [Gort and Demme] say that during the investigation of historical truth it is impossible to achieve absolute truth. *Legal reliability is not mathematical....*<sup>99</sup>

Well aware of the impending adversarial process, and the direct challenges to medical testimony it would entail, Legonin distanced physicians from their former association with certainty. But apart from this disavowal, what, exactly, could physicians offer? In place of “absolute truth,” Legonin lowered the sites of forensic medicine to a more humble explanatory capacity, that was well-suited to the new evidentiary threshold: “Legal reliability requires only the complete clarification of the fact of the defined, reasoned relationship [between cause and effect]....”<sup>100</sup>

Though Legonin addressed this issue proactively, Russian physicians were not the first to grapple with the epistemological dissonance that procedural reform of this sort entailed for medicine. German physicians were two decades ahead of their Russian counterparts in procedural reform. German views also varied from those of their Russian counterparts. Renowned Prussian forensic physician, J.L. Casper, expressed his irritation and outrage at this vestige of the old procedure. Speaking of the problems of contemporary forensic medicine (1860) in the German-speaking world, he noted that besides

[a] blending of legal and medical ideas and objectives ... another greater and more consequential error in the practice of forensic medicine ... is the tendency to endeavor to obtain *strict apodictic proof*, such as was required by the practice of the older penal courts, founded upon the ancient theory of evidence in the science of penal law, with which legal medicine has most unseemly identified herself.<sup>101</sup>

Casper also viewed such expectations as an unfair burden on forensic medicine, that no other fields of medicine were forced to bear:

Apart, however, from the facts—that the modern science of penal law and the practice in crime courts have relinquished this theory of strict proof, that we have this strict proof replaced by the moral conviction of the Judge.... Apart from all of this, I demand, in what other branch of general medical diagnosis, of which the forensic is but a part, is such *indubitable certainty* required, or where can it be attained?<sup>102</sup>

Casper's viewpoint casts into sharper relief the singularity of the Russian response to the same procedural transition. Casper saw such expectations of infallibility as outmoded traces of a bygone system, to be disassociated once and for all from the forensic physician. The response of a Russian physician, Simonich, in 1867—with one foot still in the old system, and another just barely in the new—was strikingly different. In reform-era Russia, condemnation of the former inquisitorial system—itself a fashionable way of endorsing reform—extended to the various elements of that system. In keeping with this general climate of repudiation, Simonich dismissed the manner in which the old system ascribed infallibility to physicians and accepted their conclusions as “axioms.” Notwithstanding this criticism, however, and unlike his Prussian colleague, Simonich did not reject the idea or desirability of indubitable medical testimony *per se*. As we will see below, in the process of rejecting the old procedural system, Simonich sought a new means by which physicians could maintain the same status and influence which they enjoyed up to the reform. This was the purpose behind Simonich's proposed program of behavioral reform based on the language and ideology of science.

## FROM PROOF TO PERSUASION

This imported language of “fact” and “objectivity”—this new picture of the physician’s identity vis-à-vis law and science—did not simply trickle in passively via lectures and course programs. Beyond those diffuse channels, these new ideals were drawn into sharp focus and mobilized into a explicit call for behavioral reform, and a strategic redefinition of the physician’s identity in the newly reformed legal context. In 1867, just shy of a year after the opening of the new courts, an article entitled “Forensic-Medical Objectivity,” by physician Simonich, appeared in the new journal, *Archive of Forensic Medicine and Social Hygiene*.<sup>103</sup> The Austro-German influence, and Shauenstein’s text in particular, was Simonich’s main source of inspiration. He also cites Casper and Schurmayer, authors of the two German forensic-medical texts that preceded Shauenstein’s. Interspersed throughout, he cites tenets from the most recent (1865) congress of psychiatrists in Germany.

In “Objectivity,” Simonich applied the language and ideals of science to the consequences of the procedural reform that I have elaborated above: the transition from certainty to reliability, physicians’ “fall from infallibility,” and the new imperative of moral persuasion. Rather than arcane points of legal theory, for physicians these changes were palpable and at the forefront of how they experienced and understood the judicial reform. As Simonich wrote, “In former times, and yet not so long ago, our court did not trouble to scrutinize the expert’s opinion ... one final conclusion was enough in the form of one or the other, confirmatory or negative formula.... It used to be enough to call an appearance by its own name, and the existence of it was indubitable, completely proven.”<sup>104</sup> He also was acutely aware that “at the present time, the matter has changed.” Capturing the essence of this transition from the eyes of a physician, he wrote:

With the development of science and improvement of the court, one final conclusion of the expert is no longer enough.

Neither the court nor public still look at the maxims of experts as on a sacred subject and do not accept them as apodictic. On the contrary, they try to comprehend them and be convinced, and by no means do they any longer give excess weight to the opinion of the one who is unconvincing, but who occupies in society a status with character that convinces.<sup>105</sup>

In examining the article “Objectivity” and the case study upon which it was based, the following section considers how physicians turned to the ideology of science to restore their privileged and influential status in judicial matters from the time of Peter. My reason for doing so is not simply to write another chapter in the history of objectivity—valuable as that may be—but to reveal the fault lines in the medical occupation at the middle of the century. In this regard, I consider how this new criteria for establishing credibility and retaining influence also served as a way to keep authority distributed among state service physicians, in response to the new form of “specialist” authority that was also emerging at this juncture, and seemingly poised to fill the void in its own right.

As we have seen, personal conviction had little significance in Roman-canonical procedure. The aim of the inquisitorial law was to guarantee the objective certainty of judgments, not to “persuade” anyone.<sup>106</sup> With the elimination of the Roman-canonical law of proof and the introduction of trial by jury, however, procedural principles were completely inverted, and persuasion took central stage in legal decision-making. The main inspiration for a new evidentiary regime on the continent, including Russia, became the so-called principle of free evaluation of evidence. As Mirjan Damaska explains, “The adjudicator’s inner persuasion—his *conviction intime*—that a fact was proven was thought sufficient to justify the verdict.”<sup>107</sup> As legal historians have told us, this conception of proof had been in effect in England for centuries as a natural result of the use of jury trial; moral persuasion was the only workable standard of proof in a system of lay adjudication (as opposed to the professional judges on the Continent).<sup>108</sup> Yet despite the widespread attraction to common law forms of justice on the Continent—or as Russian legal scholar A. Butskovskii put

it, “Anglomaniya”—the adoption of English admissibility rules was never seriously contemplated by Continental jurists.<sup>109</sup> In this aspect, among others, Russian judicial reform echoed that of the Continent and France in particular, where the jury trial was first transplanted, and whose adapted form prevailed on the Continent.<sup>110</sup> In short, mathematical certainty was replaced in an even swap with moral persuasion (*conviction intime, freie Beweiswürdigung, vnutrennoe ubezhdenie*). As Shauenstein explained, “The jury is not connected—as was the scholarly judge—to the theory of evidence ... [the jury] does not blindly believe in infallibility but must be convinced of expert opinion by virtue of the explanations and arguments on which it is based.”<sup>111</sup>

This new procedural imperative of persuasion was at the center of Austrian Shauenstein’s advice to physicians. Under the new trial phase of proceedings—besides their written conclusions for the preliminary investigation—physicians for the first time had to present and defend their conclusions orally. This performative dimension of the physician’s task was not lost on the Austrian physician. “Arguments, upon which the opinion is based,” he instructed, “must be laid out clearly and with confidence, which easily convince others.”<sup>112</sup> He also advised that physicians “do not run on too long, and bore or confuse the listener,” and that it was necessary to “prevent objections or rebut them by convincing arguments.”<sup>113</sup> To be convincing to juries, Shauenstein further recommended that physicians exhibit “quickness of thought and calm assuredness, which only solid knowledge affords....”<sup>114</sup> Physicians of the German-speaking world, with two decades of the new procedure under their belt, were clearly aware by 1865 of the importance of being persuasive.

Simonich picked up on this message, and did not mince words in relaying it to his Russian audience. Importing the point directly from a German source, Simonich isolated one of the resolutions from the 1865 meeting of German psychiatrists in Gildesheim (in Lower Saxony), stating: “The value of a medical opinion is based exclusively on its persuasiveness [*ubeditel’nost’*].”<sup>115</sup> Unfortunately, this was precisely the opposite quality that the inquisitorial system had fostered in physicians.



Contemporary Russian physicians concurred that the inquisitorial system (as it operated in Russia, at least) bred narrow and perfunctory medical opinions. As some physicians observed, the system offered no incentive for thorough forensic medical investigations or conclusions. Complaints about the formalistic nature of medical opinions were not restricted, however, to the rank-and-file state physicians, but were voiced across the board—from city physician to university and to Medical Council. In 1863, for example, the Medical Council received a complaint that the *fizikat* at St. Petersburg Medical-Surgical Academy, in his conclusions for a forensic dissection, was more concerned with form than substance. The Medical Department, which originally fielded the complaint, recommended to the Council that in the forensic-medical testimony “not the formalities of the [medical] investigation, but the essence of the very case should play the main role.”<sup>116</sup>

In the immediate wake of the reform, with all hopes on the untested new judicial system, and Western literature as their guide, physicians identified the inquisitorial system as the source of the shortcomings of Russian experts. E.V. Pelikan, chaired professor of forensic medicine and director of the Medical Department at the time of the reform, led the chorus of complaints. An influential and respected voice in Russian medicine, Pelikan stated that “Experts compiled their written conclusions, as practice has shown, with negligence, routinely, monotonously, according to general stereotype, without appropriate justification, without strictly scientific conclusions ... they very rarely possessed scientific value.” Tracing the problem to inquisitorial procedure itself, he added that “the very form of [the conclusions] served as the best cover—to hide the negligence in the study of the case, the insufficiency of knowledge, and unsatisfactory level of argumentation.”<sup>117</sup>

It was precisely this norm of practice—ingrained through a century and a half of practice under the former system—that Simonich held up as his target. This native norm was at odds with the newly imported procedural imperatives. Therein lay the problem and the mission for Simonich, in his effort to produce a new breed of expert.

“Such is the demand of science, such is  
the task of the expert”

With this pithy dictum—and the Austrian text as his guide—Simonich redefined the physician as an “expert” equated with science and its ideals, and introduced a new manner of thinking about the physician’s age-old forensic-administrative obligation.

It was one thing to say it was necessary to be persuasive, and another to say what that required. Shauenstein peppered the “General Part” of his Austrian textbook with a menu of qualities and ideals which, in sum, were said to make medical testimony reliable and convincing, and in turn, serve as the basis for the judge’s (or jury’s) “trust” in a given physician. A physician’s conclusions and testimony were to exhibit “fullness” and “precision,” be “well-grounded” and “objective”; all of these terms were mixed and matched throughout the text, and paired with the overarching ideal of “*nauchnost*” (literally, “scientific-ness”) which was meant to encompass all of the above qualities.

Simonich purposefully and surgically extracted the language of “fact” and “objectivity” from Shauenstein. Mirroring the Austrian text, Simonich renamed the components of the physicians’ forensic work, juxtaposing hoary definitions with the new division of “fact vs. logic” and reiterating the boundaries and mutually exclusive spheres it implied between law and medicine. He also introduced the criterion of “objective reliability” as the new standard physicians were to strive for and identify themselves with. Taking his terms word for word from Shauenstein, Simonich declared that “[f]ullness [*polnota*] and objective must comprise the essence of any forensic-medical investigation.”<sup>118</sup> Only via these qualities, he wrote, “is the value of *ekspertiza* and the expert determined.” In short, retaining legal weight meant being convincing, and being convincing meant refashioning the forensic physician along the lines and ideals of science. As he succinctly put it, “Such is the demand of science; such is the task of the expert.”<sup>119</sup> In this way, Simonich redefined the physician’s role from administrative *chinovnik* to scientific expert.

This reconceptualization served a particular purpose in the Russian setting at the middle of the century, that is, the immediate concern of securing physicians' authority across the changes produced by the judicial reform. It was in this context and for this purpose that Simonich introduced and promoted this new framework of ideals. Taking a line straight from Shauenstein, Simonich wrote, "the degree to which the expert correctly understands and evaluates the appearances ... is the degree to which he can explain the mutual connection and interdependence between them."<sup>120</sup> While faithfully adhering to the Austrian model up to this point, Simonich departed from it when explaining why this new manner of explanation was necessary. Reflecting the concerns and imperatives of Russian physicians on the eve of reform, Simonich added, "and the degree to which he correctly describes the appearances, is the degree to which they will be ... indubitable."<sup>121</sup>

## OCCUPATIONAL FISSURES

Simonich took his new approach to expertise, and counterpoised it to the norms of Russian practice. Simonich selected as his focus the forensic-medical clinic of the Kiev Military Hospital. As the site of clinical training for medical students, it represented, in his eyes, a breeding ground for future experts. Simonich's self-proclaimed task was to examine the "world view" of this institution and its handling of an insanity case, as an example of what was wrong with Russia's contemporary forensic medical practice just prior to the reform. "One should not forget," he cautioned,

that the clinical forensic-medical section was raising [*vospityvalo*] future forensic physicians on the kind of forensic-psychological investigation, and forensic-medical opinions, as in the investigation of Val'chenko. Moreover, [this was happening] on the eve of the reform of our court, which has changed

so radically both the significance of *ekspertiza* and the status of the expert. [Consequently, it was occurring at a time] when the physician, having been raised on forensic-medical “yes” or “no,” will have to confront completely different conditions in his subsequent, independent activity. He will meet unceasing checking over each of his activities and nagging demand for objectivity and reliability from his opinions.<sup>122</sup>

In short, the “world view” of the clinic, operating under pre-reform norms, was ill-suited to the new imperative of “persuasiveness.” These former norms, which Simonich illustrated by way of a prominent and controversial case study, were renamed “unscientific.” Simonich took as his measure the set of ideals, concepts, and qualities that he culled from Shauenstein’s Austrian textbook, specifically, the new ideal of “objectivity” and standard of “reliability”—which Simonich merged to form his own neologism and standard, “objective reliability.” In the remainder of this section, we will examine how and why these terms acquired a particular meaning in the Russian context.

Simonich’s case study was a highly publicized and protracted medical polemic that played out in the medical and general press in the early 1860s.<sup>123</sup> At the root of the polemic, two physicians, F.F. Ergardt and M.G. Sokolov, disagreed sharply over the diagnosis of a potentially insane criminal who was sentenced to the death penalty.<sup>124</sup> The titles of their dueling articles speak for themselves: “Simulation, Mistaken for Insanity” and “Insanity, Mistaken for Simulation.”<sup>125</sup> The diagnosis in question took place in the forensic-medical section of the Kiev Hospital, in precisely the cusp of the judicial reform (1863–1866), that is, the window between its enactment and implementation. This debate indicates once again that the medical occupation did not represent a homogenous viewpoint, but was a more complex social group.<sup>126</sup>

The circumstances of the case were as follows: Makar Val’chenko (hereafter V.) a 30-year-old private in military service, was arrested and prosecuted in a military court in June 1860 for participating in insubordination to his immediate authorities. V. did not

act alone; the disobedience was rendered by his entire military company. Three years later, he was sentenced to running the gauntlet and exile (*ssylka*) to hard labor at a factory for five years. Upon learning of his sentence, V. began to exhibit erratic and wild behavior. This included other “insulting behavior” towards official authorities—known by statute as *oskorblenie*—which he committed on repeated occasions.<sup>127</sup> Once such an act alone was punishable by death; the repeated nature of such acts, according to statute, only multiplied his guilt.<sup>128</sup> (Interestingly, Ergardt viewed the insult of official authority as evidence of V.’s sanity, while Sokolov viewed it as evidence of his insanity.) For these crimes, according to the court’s sentence, V. was “deprived of all rights of *sostoianie* and bronze medal, [and] to be punished by death by firing squad.” His multiple visits to the forensic-medical section of the Kiev Military Hospital for psychiatric examination, across the period 1863–1866, were interwoven throughout this course of legal events. Ultimately, as Sokolov noted as a “sad postscript” in his article, V. died during his final stay at the hospital, in 1866. A dissection was performed, but “nothing was found for the explanation of his mental disorder.” This, however, did not sway or discourage Sokolov, who had been an ardent advocate of V.’s insanity throughout. “This [type of result] happens in the majority of cases,” he acknowledged, “but it still does not prove that some kind of changes in the brain did not exist—they must be, only we are deprived of the means to recognize them.”<sup>129</sup>

By the time this case reached the hands of Simonich, he was four layers of critique removed from the original events. The original *akt* of the forensic-medical clinic was subjected to different stages of review, and the resulting picture was that of a frame within a frame within a frame. As such, when Simonich entered the fray, the case already represented a crucible of social and institutional agendas. Upon these compounded interests, Simonich layered the language and ideals of science. Thus to understand the meaning Siminoch afforded these imported terms, such as “objectivity,” it is necessary to peel back the different agendas involved. To do this requires a brief look at the interests and perspectives of

the different participants. In other words, I seek here to examine, as Lorraine Daston puts it, “when and how word [objectivity] and thing intersected, for the choice of which word to attach to which thing is never arbitrary.”<sup>130</sup>

There were as many opinions about Val’chenko’s mental condition as there were physicians, examinations, and institutions involved. Yet what the different participants singled out as the crux of the problem was professor Ergardt’s initial forensic-medical conclusions, written from his teaching clinic, in which he declared V. was not insane. Ergardt’s forensic-medical conclusion read that Makar Val’chenko was tested in the Kiev Military Hospital, and it turned out that he was not possessed (*oderzhim*) by insanity (*umopomeshatel’s tvo*).<sup>131</sup> Each subsequent critic honed in on this conclusion—but from different points of view. Given that all of these participants were physicians, the different significance that each read into the case sheds light on the fault lines within the Russian medical occupation at the middle of the century.

A series of participants joined in the accreting chorus of critique against professor Ergardt. The cast of characters, in the order which they entered the case, were F.F. Ergardt, professor of forensic medicine at the University of St. Vladimir in Kiev; the local Military-Medical Inspector; M.G. Sokolov, the senior physician of the military hospital which housed Ergardt’s forensic-medical teaching clinic; and finally, our main interest, the author of “Objectivity,” Simonich. The fact that this type of case was not an isolated event but a common occurrence only intensified the positions of all involved. As Simonich bluntly observed, “there are many Val’chenkos everywhere.”<sup>132</sup> Indeed, each of the perspectives, to which we now turn, were born of repeat experience.

Professor Ergardt examined V. several times at his forensic-medical clinic, and it was this assessment (and his academic priorities) which served as the object of the controversy. Ergardt, however, was not the first to examine V.’s mental condition. Well before his initial arrest, and bridging his subsequent acts of “disobedience,” V. had been suspected of mental disorder, and subjected to testing and examination multiple times: twice in the military hospital, and the same number of times in the Medical Section

of the provincial government.<sup>133</sup> When V. was finally sent to Ergardt's forensic-medical section, (but unaccompanied by any information about these previous examinations), professor Ergardt determined that he did not suffer from insanity. After V. was resent to this forensic-medical section for the third time (and having been diagnosed on four occasions as simulating insanity), Ergardt refused to examine him again, in the interest of his clinical instruction. Ergardt viewed repeat "examinees" such as V. as an unnecessary interruption to his teaching, and complained about this in a letter to the hospital's chief physician (Sokolov) regarding V. and another three-time examinee. "Finding it impossible under such conditions to continue lessons and teaching ... and considering new testing completely unnecessary [for those] who continue to simulate illness, I must request the urgent transfer of the aforementioned arrested individuals [*arrestanty*] from the clinic of the forensic-medical section."<sup>134</sup>

Local Military-Medical Inspector N.P. Evfanov was invited to review and resolve the conflict over V.'s diagnosis, and as such, he constituted the next layer of critique on the case. Inspector Evfanov was enlisted as a procedural "last resort," after V.'s case had split the military court that heard it on 25 April 1865.<sup>135</sup> Though he was found guilty of "repeated violations of military discipline" and sentenced to death, two of the six military judges (the two junior members) dissented on the basis of the "disagreement of the physicians themselves" over V.'s mental condition.<sup>136</sup> In their "special opinion" the dissenting judges recommended, once again, "new and more thorough testing." Following protocol for such outcomes, and passing through several military layers, the matter eventually ended up in the hands of the military-medical inspector, whose official responsibility it was to resolve such "misunderstandings" among medical *chinovniki*.<sup>137</sup>

Inspector Evfanov located the original sin in professor Ergardt's "laconic *akts*." No stranger to foreign study himself, and having worked and trained in the capital cities, the inspector was seasoned, worldly, and well-versed in the reform principles by the time the Kiev case fell into his lap.<sup>138</sup> Writing his report in 1865, one year after the judicial reform statutes were enacted, he

expressed his critique of Ergardt's *akt* in the language of reform. Evfanov extended the principle of *glasnost*, central to the new courts, to the physicians who would work in them. In the inspector's opinion, "physicians' final conclusion must be the consequence of open [*glasnyi*] discussion...."<sup>139</sup> The inspector sought to gain the judge's trust, which, under the reformed system, was necessary if the physician's conclusions were to carry weight. Conclusions based on "open discussion," the inspector explained, "all the more acquire the trust of the judge ... the more [the physician] paid attention to all the facts, and in the clarification of them proved his knowledge of mental [*psikhicheskaia*] medicine and laws."<sup>140</sup> Moral persuasion was now foremost in the minds of state physicians concerned with their influence in adjudication. And as such, the inspector deemed Ergardt's conclusion, without any explanation of the defendant's behaviors, "unconvincing."<sup>141</sup> In short, the inspector's recommendations were imbued with the spirit of *glasnost*, but significantly, in relation to physicians' new requisites under the new courts.

Serving as the next frame of reference on the case was M.G. Sokolov, who had clashed with professor Ergardt over V.'s repeat visits to the hospital he supervised. In his article about the protracted case, Sokolov adopted and reinforced the inspector's criticism of Ergardt's conclusion, plugging it into his own frame of reference, agenda, and institutional perspective. This perspective included a humanitarian interest in mentally ill defendants, and a more tendentious critique of "specialist" authority. Both interests reflected Sokolov's particular occupational location within medicine.

The broader context in which Sokolov discussed the Val'chenko case was a longstanding concern for the punishment of criminals who were mentally ill but undiagnosed as such, especially in cases that carried sentences of capital punishment or civil death.<sup>142</sup> "We will not be concerned with all the conditions which lead to insanity," he wrote, "but we consider it necessary to mention one, practically the most important." By that, he meant "precisely, prolonged prison confinement ... the consequence of which, up to now



is little known to the public.”<sup>143</sup> He based his conclusion on several years of observation of those in custody, to study their “daily life [byt] and moral mood.” His medical evaluation of its consequences were tinged with more than a hint of political overtone, as he asserted that “prolonged deprivation of freedom and the peaceful good which it entails will disorder the brain activity of anyone.”<sup>144</sup> To be sure, Sokolov’s occupational experience brought him particularly close to this issue. Working as a medical inspector in Tobol’sk for several years, Sokolov would have regularly encountered convicts on their way to hard labor or exile in Siberia<sup>145</sup>—as Tobol’sk served as the central processing depot for exiles since the time of Boris Godunov, and in a more regularized fashion since the time of Speransky.<sup>146</sup> Notwithstanding this broader social critique, Sokolov’s main focus of attack lay elsewhere.<sup>147</sup>

The core of Sokolov’s critique rested on his attack against “specialists.” While not viewed through the lens of *glasnost*’ like the inspector before him, Sokolov shared with him a broader interest in medical authority and how it played out in (and through) state institutions. Sokolov’s criticism of Ergardt’s conclusion was refracted through a resentment or disapproval of the social and institutional weight attached to the opinions of “specialists.” Sokolov agreed with the focus of the inspector’s criticism, reaffirming that Ergardt’s “laconic *akts*” were the source of the cascading confusion over V.’s diagnosis. “Such *akts* we consider beneath critique,” he stated with contempt. Yet for Sokolov, they served as a springboard for criticizing “specialists.” Yes, Ergardt’s conclusion was terse and unexplained. But why was Sokolov troubled by this when, after all, it was by no means unusual and in fact, business as usual? From Sokolov’s perspective, it was the preponderant weight and authority that institutions invested in Ergardt’s conclusion, and hence, the redirection of administrative and social influence into unofficial hands. Ergardt’s *akts* comprised “the true negligence in this case,” he wrote, but meanwhile, “this negligence also served as the basis for physicians who examined [Val’chenko] several times in the provincial board.” And it was those provincial administrations that were officially empowered to determine the

question of insanity. “Consequently,” Sokolov declared, “the main moral responsibility for the mistake lies on those who signed the first *akt*.”<sup>148</sup>

Thus, for Sokolov, it was the institutional investment in Ergardt’s conclusions that transformed a norm of practice (formalistic forensic conclusions) into a moral and social problem. The problem was not the exercise of medical authority through state institutions; it was the new redistribution of that authority, insofar as it was disproportionately invested in “specialists” at the expense of the traditional sources—that is, the state-service physicians who worked in state institutions. Casting an acerbic barb, Sokolov mused, “If our specialists will thus decide the fate of a person, then all that remains is to pity those unfortunates, who must be subject to their investigation.”<sup>149</sup> Sokolov was outraged at the deference shown towards this emerging type of specialist authority, apparent not only in the administrative bodies, but also in universities. He further observed, with dismay, that “[t]he opinion of the specialist is highly venerated to such a degree, enjoys authority to such a degree, that the medical faculty refused even to name another professor to the composition of the Commission [charged with examining V. for the fourth time], on the basis that the real specialist [Ergardt] had already diagnosed the patient as healthy.”<sup>150</sup>

Sokolov’s response to the case begs several larger questions: What motivated Sokolov’s resentment of specialists? Why did it matter if there were no paying patients to compete for? How was he defining specialist? To whom did this word refer on the Russian landscape? In other words, what were the intra-occupational tensions on the eve of reform?

As historians have described, the rise of specialism in nineteenth-century medicine encompassed both an intellectual and a practical orientation.<sup>151</sup> At the beginning of the nineteenth century, practitioners alleging a peculiar competence in treating one disease or body part challenged holistic understandings of health and disease that had dominated medical thinking up to the end of the eighteenth century; but it was the practical extension of this conceptual shift that most generated resentment among fellow physicians. Histories of Western medicine have depicted the occupa-

tional arena in which physicians worked as a “medical marketplace,” where claims to special competence were, in the words of Charles Rosenberg, “necessarily perceived as underhanded claims for the patronage of society’s limited supply of paying patients.”<sup>152</sup> As such, historians explain Western physicians’ early resentment towards specialism by the primarily economic but also intellectual incursions it made on traditional medicine and general patterns of practice.

Conditions were different in Russia. First and foremost there was no “medical marketplace” in the economic sense. As we have seen above, physicians were employees of the state, and did not rely on private patients. This is not to say there were not competing schools of thought or intellectual approaches vying for authority. Indeed, all sorts of healers coexisted in Russia as in the West, something that historian Elise Wirtschafter describes as “a pluralistic integration of the available modes of understanding.”<sup>153</sup> However, this intellectual pluralism was not as *laissez-faire* as Wirtschafter suggests. As archival documents show, the state, in the form of medical officialdom, fiercely protected the authority of orthodox medical science—but, only when its methods of treatment or legitimacy were explicitly threatened or disparaged in the name of alternative schools of thought or approaches (like homeopathy). Significantly, however, this “protectionism”—which the Medical Council enacted by means of publication censorship—was employed not for economic reasons or “professional advantage,” but the broader intertwined state interests of public health and public order.<sup>154</sup>

This orientation is demonstrated in the Medical Council’s discussion and censorship of a monograph on homeopathic medicine. The St. Petersburg Censorship Committee forwarded the manuscript in question to the government’s highest medical bureau, asking whether or not it “found any obstacles” to allowing its publishing. In its discussion of the matter, the Medical Council noted that homeopathy “enjoys in Russia complete freedom both in practice and in print.”<sup>155</sup> However, there were lines not to be crossed. “The author [Turachek] can extol homeopathy as much as he likes, he can expose the negligence and charlatanism of separate individu-

als, but he does not have the right to spread in print false understandings about medical science to the harm of public health, nor to speak unsuitably about the entire medical *soslovie*.”<sup>156</sup>

To be sure, the Council’s opinion stemmed as much from the author’s comments as it did from the Council’s paternalistic view of the “*narod*,” reflecting both the traditional state perspective, and attitudes of the educated elite in this period. According to the Council, “Our *narod*, still not very developed [*malo razvityi*], needs the dissemination among it, by the path of persuasion, of useful information and sound understandings about medical methods.”<sup>157</sup> In this vein, the Council also declared that the author had “no right” to make “inappropriate comments about all our medical institutions, to the detriment of our governmental measures,” which are applied “by all enlightened states” for the protection of public health, such as quarantine and hygienic measures during epidemics. Such disparaging comments not only “undermin[ed] the *narod*’s trust” in governmental measures and the physicians who implemented them, but, significantly, paved the way for social unrest.<sup>158</sup> For these reasons, the Medical Council would not tolerate the author’s “apologia for peasant [*narodnye*] disturbances and catastrophes” in times of epidemics, which “in vain” the author “blames on physicians.”<sup>159</sup> Based on this affront to the state’s medical enterprise, and its efforts to preserve social order more broadly, the Medical Council denied permission to publish the manuscript “without alterations in conformity with the Council’s comments.”<sup>160</sup>

Thus, even in the absence of private economic considerations, it was not the unorthodox ideas of homeopathy that ruffled the Medical Council, nor the competition it posed for the hearts and minds of Russia’s vast patient population. Instead, medical officials took umbrage and action against those comments that undermined the social authority and influence of state physicians. From the perspective of elite medical officials, the issue was not of economic, nor even intellectual competition, but the protection of official sources of authority—which included medical science—in order to maintain the Council’s prevailing priority of public order.

What was at stake then, I would argue, was the containment of

medical authority within the state's institutions and medical administration, as controlled conduits of authority and implements for achieving state priorities, or social agendas (as in the case of Sokolov). While the forms and sites of this "containment" effort varied, the underlying interest was the same, whether it be, as in the case of the Medical Council, the elimination of invidious comments from without—or in the case of Sokolov—suspicion of the wholesale transfer of authority into the hands of individual specialists. Having earned the title of medical inspector, Sokolov was himself part of the same medical-administrative system as the Medical Council members (albeit lower on the hierarchy); and though their targets differed, Sokolov's motivating interests—like those of the Medical Council—were shaped by an occupational location within the state administration. Both the Medical Council and former inspector Sokolov sought to eliminate, or at least tame into administrative submission, alternative, non-official sources of medical authority that, deliberately or not, sapped it from official structures and servitors.<sup>161</sup> In other words, the medical officials we have discussed sought to prevent the separation of medical authority from state institutions.<sup>162</sup>

Beyond the issue of medical authority and its distribution, it is reasonable to suggest that the more tangible matter of wages might have further fueled resentment towards "specialists" (university-based professors) among state-service physicians. Though the bar was equally high for both types of occupation, the remuneration was not. This was particularly true for Sokolov's former post of medical inspector. Both "inspector" and "professor" required the top medical degree (*doktor* of medicine), both worked in state institutions (universities and medical boards) and both were paid by the state. However, the salaries for academic positions were dramatically higher. The professor was, by a distance, the top-paying medical occupation throughout the nineteenth century. As of the 1863 University Statute, a chaired professor received 3,000 rubles per year.<sup>163</sup> Inspectors received less than half that. City and district physicians (that is, those officially designated as forensic physicians) received 190 rubles per year—the same salary decreed in 1797 when the post was created—making them the lowest pay-

ing medical occupation, and even lower than some skilled laborers in 1870.<sup>164</sup> The disparity between the wages of academic and state service posts was striking. Even the lowest academic rung, the privat-docent received up to four times that of the city and district physician.<sup>165</sup>

Who was considered a “specialist”? How was this term used in medicine at the middle of the century? How did careers vary, such that Sokolov (a former medical inspector in provincial administration; now hospital chief) so drastically distinguished himself from professor Ergardt (the so-called “specialist”)? After all, both physicians shared the same conception of the body, and it was not a matter of different intellectual approaches to treatment or practice (for example, choosing to focus on specific body parts or diseases). Both espoused a somatic understanding of mental illness, and employed the latest Western categories, though neither physician in their postgraduate training had specialized in psychiatry (which did not even have its own department at the time they were pursuing their doctoral degrees).<sup>166</sup> Western understandings of “specialist” clearly did not apply. Russian occupational tensions revolved around different axes, different motivations, with different issues at stake. Who then did a mid-nineteenth-century physician recognize as a specialist? To help answer this question, we turn briefly to the careers of the two protagonists.

Physicians F.F. Ergardt and M.G. Sokolov were contemporaries with overlapping intellectual interests and orientations, but different institutional outlooks. To be sure, throughout the nineteenth century Russian physicians typically held a variety of positions in the course of their careers, moving fluidly between academic, clinical, and administrative/civil service posts.<sup>167</sup> Notwithstanding this occupational norm of “mixed careers,” one also finds concentrations along the spectrum, that is, physicians whose careers remained focused within one track or another. This was the case for Ergardt and Sokolov: the former rooted in the academic sphere; the latter primarily in administrative institutions. This corresponded to two parallel legal-title (*zvanie*) “tracks.” Just as there were different state-defined and regulated degrees in the academic sphere that corresponded to a hierarchy of university positions,

there was a parallel system of “titles” (*zvanie*) associated with posts in the civil medical service. These scholar-service (*uchenyi-sluzhebnoi*) titles, like the academic degrees, were based on university-administered examinations.<sup>168</sup> It was this divergence in career track—one in civil service, the other not—and the institutional perspectives that went with it, which fueled their polemic and gave an edge to the controversy over Val’chenko’s diagnosis.

Feodor Feodorovich Ergardt, reflecting the disciplinary roots and typical career patterns in forensic medicine, came to the field of forensic medicine from anatomy. After earning his *doktor* of medicine degree in pathological anatomy in 1854, Ergardt turned his attention to forensic medicine when designated as adjunct in forensic medicine at Kiev’s department of state medicine (*gosudarstvennoe vrachebnovedenie*) in 1857. His formal entry into the field coincided with a novel institutional development within forensic medicine, the opening of a forensic-medical teaching clinic under the St. Petersburg Medical-Surgical Academy.<sup>169</sup> Clearly, Ergardt kept an eye on such developments in the capital, founding a Kiev version of the clinic four years later, under the Kiev Military Hospital. From this entry into forensic medicine until he retired after thirty years of service in 1881, Ergardt ascended the professorial ranks, enjoying the perks and marks of a successful academic career: multiple trips abroad, serving as dean of the medical faculty, and a solid publication record.<sup>170</sup> In psychiatry, as a subset of forensic medicine more generally, he married the theoretical and practical in his academic career; from 1862 on, Ergardt assumed the directorship of his newly-founded forensic-medical clinic, where he was responsible for the examination of “living individuals” (the official designation for forensic-medical questions of mental condition). Since early century, anatomical theatres and the dissections conducted therein afforded students practical training in the forensic examination of corpses; now, beginning in the 1850s, newly-established forensic-medical clinics, set up in local hospitals, were to provide students with practical forensic experience with psychiatric examinees.<sup>171</sup>

The career of Mikhail Grigor’evich Sokolov developed outside of university walls. He built his career in administrative institu-

tions and hospitals—both of which involved dealings with psychiatric cases. Sokolov's articles reflected the broad range of subjects that would have fallen under the umbrella of "state medicine," unlike Ergardt who focused exclusively on forensic-medical topics.<sup>172</sup> Also in contrast to Ergardt, who remained rooted in Kiev University, after graduating from the Moscow Medical-Surgical Academy, Sokolov began a peripatetic career—crisscrossing the Urals—with a string of back-to-back stints at various state administrative institutions and hospitals. Sokolov accumulated practical experience in various military hospitals, provincial governments (*gubernskoe pravlenie*) and medical boards, adding up to at least ten different institutions in all.<sup>173</sup> It was during one of these stints, in Kiev, that Sokolov and Ergardt crossed paths. Sokolov was serving as the senior physician at the Kiev Military Hospital (1864–1866), where two years earlier professor Ergardt had begun directing the hospital's new forensic-medical clinic that he had just founded.

Which brings us full circle back to Simonich, who redefined the forensic physician according to the ideals of science as a means of preserving the physician's authority in judicial matters under the new procedural setting. By layering the new standards of "objectivity" and "reliability" onto the multiple agendas compounded in the Val'chenko case, the tensions and concerns of mid-century Russian medicine, in turn, shaped the meaning, understanding, and function of these terms on Russian soil. Thus, the call for detailed particularity and openness in one's medical conclusions, that the inspector had urged under the rubric of *glasnost'*—and Sokolov seconded out of antipathy towards specialism—Simonich advocated under banner of "objective reliability." Simonich introduced a set of qualities associated with science that transcended social status, official state-service title, or specialist status as the persuasive element.

What did objective reliability mean in this context?<sup>174</sup> How did Simonich define it? In contemporary usage, as R.W. Newell argues, the term "objectivity" has two meanings: one that relates to the status of things, and another that relates to the quality of human behavior.<sup>175</sup> Historians have recently undertaken the daunting task



of disentangling, historically, the various nuances of meaning embedded in this complex and ultimately, ideologically potent term.<sup>176</sup> While the archeology of “objectivity” sheds light on the sources of meaning that accreted over time, for our purposes what is important is that objectivity, when introduced into forensic-medical discourse by Simonich, already arrived as a term with layers of meaning, a melding of the ontological and epistemological, and malleable to Russian needs. What is key here is that while Simonich plucks the terms “objective” and “reliability” directly from the Austrian text, it is the local context in which he applies them that fills them with meaning. He never explicitly defined “objectivity,” but instead, used it as a foil to homegrown norms of practice, which, under the reformed procedure, would be self-defeating for physicians. In other words, Simonich defined “objectivity” by what it was not. While Simonich’s usage of the term did not conform strictly with any of the classic forms of objectivity, as identified by historian of science Daston, it does, more generally fit with her general analytical point, that “the various kinds of objectivity might be classified by what they oppose.”<sup>177</sup> In our case, what was opposed was the system of forensic-medical practice that developed under inquisitorialism, specifically, this encompassed: first, the “axiomatic” form of terse, unexplained medical conclusions; and second, the perceived usurpation of that “apodictic” authority by “specialists” in this period of transition to the new procedural system. The positing of a new standard of “objectivity,” as Simonich defined it, addressed both of these concerns, while in keeping with the new spirit of *glasnost*.

As it turns out, the fundamental issue was not dueling diagnoses, but dueling types of authority: official versus academic; general versus specialized; traditional versus new. As Simonich observed, “[i]n all of these opinions [voiced in the V. case], both separate and collective, the one that carries the most weight before court, by itself, must be the opinion of the forensic-medical section, justified by the professor-specialist. On the side of his opinion was both the specialization [*spetsialnost*] of the institution and professorial authority [*professorskii avtoritet*].”<sup>178</sup> The manner in which Simonich understood and criticized Ergardt’s laconic *akt* was thus

inseparable from the emergence of new forms of authority, and the impact this had vis-à-vis traditional forms, that were empowered by virtue of legislative decree and rooted in administrative institutions. "Without doubt," he added, "behind [the specialized, professorial opinion] would have also stood legal truth, had not—by the fortunate convergence of circumstances—the official-professorial authority been opposed by the official-medical authority of the military-district inspector, and if the fictitious specialization of the forensic-medical section did not meet the actual special legal education of the *ober-auditor*...."<sup>179</sup>

In a system in which physicians' administrative and judicial authority (and hence social influence) was meted out and ascribed by law, the rise of specialists represented a shift in the balance of power. Simonich's critique of Ergardt's *akt* rested on this balance, which was the lens through which he interpreted the case. "Let us assume," Simonich wrote, "that under the former proceedings such a formula was sufficient for the court for laying a sentence, even if it was the shooting [*razstrelianie*] of a person. In the present case it has even more weight, because it was spoken, so to speak, from the academic department [*kafedra*] for which specialization is assumed not only *de jure*, but also *de facto*."<sup>180</sup> Not all physicians viewed this transition from "*de jure*" to "*de facto*" authority favorably, particularly those left with the short end of the stick when the source of that "*de jure*" authority (the pre-reform rules of inquisitorial procedure) was about to drop away. It is in this context that Simonich reviled the opinion of the forensic-medical clinic, "being in the form of an aphorism and remaining without any analysis."<sup>181</sup> As such, "objectivity," as Simonich employed it (open explanation and associations with science), offered not only a new criteria that was "persuasive," but one that could encompass and apply to all state-service physicians, just as the former rules of proof did, and not only "specialists" with academic posts.

The criticism and call for particularity and *glasnost*' were extended to all forms of forensic-medical examination and documentation: from somatic clinical observations to conclusions for the courts. Looking at the forensic-medical clinic's case report (*skorbnyi билет*), the problem, once again, boiled down to the "yes/no,"

bureaucratically-suited answers. Simonich condemned the clinic's written observations of V. for being stated simply in the affirmative or negative. This again was not acceptable—because the very “essence” of the forensic-medical investigation, “that which gives it objective reliability” was left out: that is, particularity and explanation. As such, he compared bad form (the forensic-medical section [FM]) versus good form (that of the Commission of the three military physicians [C], which was assigned to examine V. for the fourth time, upon appeal of his case). Simonich juxtaposed the two sets of clinical records to illustrate his point: FM: “pulse is quiet” / C: “pulse is 112 per minute; beats of the heart were faster, sounds dry”; FM: “sleep is good” / C: “The attendant pointed out that V. slept during the night and did not speak with any of his room-mates”; FM: “no somatic changes” / C: “anemic appearance, pale face, a little bit swollen, the soles of feet also swollen, color of skin dirty-yellow, etc.”<sup>182</sup>

Simonich gave these terms meaning in relation to the social world in which he employed them. In delivering what no doubt would be considered a low blow in its day, Simonich negatively compared Ergardt's “objective reliability” to that of the judicial investigator. “Not in anger let it be said to the clinical forensic-medical section, that if one juxtaposes the opinion presented by professor Ergardt with the opinion of the *shtab*-officer-investigator, then it turns out that the [investigator] gave [to his opinion] incomparably more *objective reliability* than the forensic-medical section [did] to its.”<sup>183</sup> At least the investigator based his opinion about Val'chenko's “most pure” simulation on the fact that “V.'s eyes were clear, only gloomy.” Meanwhile, “[t]he *clinical* forensic-medical section did not do even this....,” Simonich derided.<sup>184</sup>

Objectivity, as Simonich defined it for the physician, thus differed from the meaning and purpose it was coming to serve contemporaneously in the Western natural science model. According to Daston, as the notion of objectivity (aperspectival) was migrating into the natural sciences in the mid-nineteenth century, this transition entailed squeezing out the “idiosyncratic” and “losing valuable, if subjective, information in the observation report.”<sup>185</sup> Transplanted to Russian soil, the term's meaning and function took

a different cast, reflecting the values and occupational priorities of the reform era. Having evolved in accordance with the interwoven imperatives of inquisitorial procedure and bureaucratic formalism, physicians' testimony already came in a standardized, impersonal package. Simonich defined "objectivity" against this native bureaucratic tradition and in conformity with the new spirit of *glasnost*'; it implied exposing all information and particularity to open discussion, rather than concealing it. These distinctly Russian priorities and values shaped a particular meaning of "objectivity" in Simonich's importation of the term.

Simonich's 1867 article represented the earliest, most pronounced call for remaking the physician-expert along the lines of, in his words, "science." For Simonich, this included identifying physicians with "objectivity"—a term filled with social content, as he defined it in opposition to forms of Russian practice cultivated under the pre-reform system; having tailored its meaning to prevailing intra-occupational tensions and concerns, Simonich posited "objectivity" as a new standard, a manner of presentation, and a methodology for investigation—all to ensure persuasiveness, and thus, retain the evidentiary heft that the old rules of proof had guaranteed physicians. As part of this transformation, Simonich redefined the physician's work in the language of immutable "fact"—a reconceptualization that by 1865 was filtering into Russian universities and academies through foreign, specifically German texts. Armed with a new language, set of ideals, and criteria, Simonich advocated a program of "behavioral reform" for physicians, while transforming the physician's forensic role as an administrative extension of the judicial function into an ideologically distinct "expert" in the image of science.

However, Simonich was not a lone voice in the wilderness. While the implementation of the reform is the subject of a later chapter, we will briefly consider here how this adaptive effort took on a life of its own and continued into the post-reform period.

## PROPAGATION

Simonich's message not only resonated, it was reproduced in somewhat programmatic fashion in the pages of *Archive of Forensic Medicine and Social Hygiene* (hereafter *Arkhiv*), through the publication of criminal cases involving physician-experts. The transcription and analysis of physicians' activity in these cases, with critical commentary by an outside physician, began six months after the new courts began to operate and continued into the 1870s.<sup>186</sup> While Simonich's main goal was to shape physicians while young, in their clinical education, these case studies were more akin to "on the job" training. This effort to retool physicians for the new courts was well-suited to the new genre of pedagogical case study legal literature that ushered in the judicial reform. This new literature was part of a broader effort among educated society to prepare themselves, and society at large, for the reform and a new understanding of legality. The forensic-medical case studies in *Arkhiv* echoed the new genre of pedagogical literature in both form and purpose, and it is in this broader context that they must be understood.<sup>187</sup>

Accompanying the judicial reform was a burst of instructive legal literature to help the new court personnel navigate the new system, as well as introduce the new legal procedures and principles to Russian society.<sup>188</sup> As one component of this efflorescence, the appearance of case-studies also reflected a shift towards the practical and the empirical in most branches of learning at the middle of the century, including medicine (as discussed above) and law.<sup>189</sup> Besides its role in the "reworking of law," the goal of this new type of "judicial-pedagogical" literature, as eminent jurist Koni dubbed it, was to rectify Russian society's "muddled" view of the task and significance of the new courts. On one hand, as Koni described it, there was confusion over the role of the new jury: "If the jury exists, then what is the judge for?" Similar confusion existed regarding the principle of *glasnost'*, fundamental to the reform. Society regarded the new open courts "like a theater," Koni observed, "or generally a place where one could pass time

without boredom.” Recalling the 1865 drafts for the construction of the new judicial buildings, Koni recounted how there were “regrets expressed that not enough space was proposed for the public—for example, for 1000–1500 people—as if the guarantee of *glasnost*’ consisted in the quantity of visitors!”<sup>190</sup> The court speeches of French, German, and English jurists presented in these case studies were expected to serve another valuable purpose; as Koni put it, “our bar [*advokatura*] is just cropping up and can hardly get along in the beginning without some imitation of foreign models.”<sup>191</sup>

So too physicians had to adapt. However, unlike those who would fill the roles of jury, prosecutor (*prokuror*), defense lawyer, and investigator—whose positions were fresh products of the reform—physicians had been providing medical conclusions for the courts since the early eighteenth century, and less formally, before that.<sup>192</sup> In this regard, the physician was the oldest element in the new court system. In contrast to other social groups, physicians viewed their process of adaptation through the lens of prior authority and social influence. Physicians’ commentaries to the case studies reflected this. While the commentators delved into specific points of medicine, all of their critiques came around to a common goal: it was necessary to be convincing and be scientific. In their commentaries, as with Simonich, the two were inextricably linked.

### The Case of Mavra Egorova Volokhova

The case studies in *Arkhip* illustrate how the trends examined in this chapter played out in practice, and how the effort to make the expert “scientific” and hence more convincing was propagated in the reform period. Among the first to lend his hand was E.V. Pelikan, one of Russia’s most influential physicians, well-known for his scholarship in forensic medicine and uppermost government positions, not to mention his founding in 1865 of the journal *Arkhip*.<sup>193</sup> As with most of the author-commentators, Pelikan chose a case that reflected his own intellectual interests, which for



*Здание Императорской Медико-Хирургической  
АКАДЕМІИ.*

*The Academy of Medicine and Surgery.*

*Throughout the imperial period, the St. Petersburg Medical-Surgical Academy attracted leading medical figures from across the Empire who trained and taught there.*

*This mid-nineteenth century street view shows the facade of the Academy as it appeared at the time of the Great Reforms.*

G. Prozorov, *Materiali dlia istorii Imperatorskoi Sanktpeterburgskoi mediko-khirurgicheskoi akademii, v pamiat' 50-letii ee.* (St. Petersburg: Military typography, 1850), frontispiece. Courtesy of the Russian National Library, St. Petersburg.

him, was forensic-chemical analysis; the microscopic evaluation of blood stains played a central role in the case he commented upon. The trial took place in the Moscow circuit court in February 1867, less than a year after the new courts opened. While many of the criminal cases that appeared in *Arkhir* involved violent events, the circumstances of this case were particularly gruesome: a 28-year-old female peasant from the Moscow district was charged with the murder of her husband, who was found in their cellar with injuries from a blunt object and his body cut in two.<sup>194</sup>

Aleksei Vasil'ev Volokhov, a peasant of the Moscow district, lived with his wife Mavra Egorova, and their six-year-old son. On 17 August 1866, Volokhov suddenly disappeared from his house. On 22 August his body was found in his cellar. Witness testimony collected during the investigation pointed strongly to his wife. The son testified that he saw his mother beat his father with the handle of an axe, and that the latter lay on the floor, silently, and that there was blood on the floor. (This testimony led to the investigator's inspection of that room, and consequently, the blood stains found therein.<sup>195</sup>) The victim's brother provided further incriminating testimony. On 21 August he was searching for his missing brother, and as he approached the cellar, he saw Mavra in the cellar's pit, throwing dirt and stones with a small shovel into the entry of the cellar, which was filled with water. Upon draining the water, the corpse of Volokhov was found, covered with dirt and stones. Relatives and neighbors testified that Mavra had poor relations and constantly argued with her husband, whom she called a swindler and crook. Mavra Egorova was charged with the murder of her husband, cutting his corpse into two parts, and the concealment of it in the cellar.<sup>196</sup>

A mix of state-service physicians and medical professors from Moscow University were invited to participate in the case. As law dictated, the pre-trial examination of the corpse was conducted by a police physician, Dobrov, who also attended the trial for the oral presentation and "checking" of his findings. Invited to the trial phase only were Professor of Chemistry Liaskovskii and Professor of Anatomy Sokolov. Given the stark circumstances of case, the



cause of death was not central to the questioning at trial; Dobrov had officially defined it in his *akt* as “the consequence of absolutely-fatal injuries, inflicted by blunt and sharp weapons to the head and neck, and the cutting of the corpse into two halves.”<sup>197</sup> Instead, the full array of judicial actors (judge, defense attorney, assistant procurator [*prokuror*], and jury members) tended to focus on the drops of blood found in the victim’s house, and after that, circumstances related to the victim’s injuries.

Besides the investigation of injuries, cause of death, and mental condition, physicians also dealt with physical evidence, the *corpora delicti* of different criminal activities.<sup>198</sup> This included suspicious stains, and most frequently, blood. The chemical-microscopic examination of blood stains was an emerging technique in the reform period, and it generated much excitement in medicine and without. Like other subfields of medicine, forensic medicine benefited from mid-century improvements in the microscope, and developments in chemistry, such as spectral analysis. The availability of these new techniques coincided with the opening of the new courts, and the combination generated great public interest in the forensic-medical investigation of blood.<sup>199</sup> According to one account, a jurist collected blood from the injuries of a person who had just been killed, wanting this “fresh” blood to be sent to an expert for chemical-microscopic analysis.<sup>200</sup> This contemporary fascination was also reflected in the proceedings of Mavra Egorova, which was the first trial under the open courts to involve this type of blood analysis. And to be sure, it was a case in which blood played a prominent role.

Blood stains were the key (and only) material evidence in the case, and as such, played a major role in the questioning of the physicians.<sup>201</sup> Investigator Plechko collected the traces of blood during his inspection of the victim’s house, specifically, the room that the son had testified about. Blood was found in many locations: spray on the wallpaper, large drops on the window, traces on the floorboards (which had been cleaned off and sprinkled with sand); upon raising one of the floorboards, streams of blood were found in the grooves; and below the floorboard, on the sand, were

clots of blood.<sup>202</sup> Prosecutor of Pathological Anatomy at Moscow University, Klein, conducted the chemical-microscopic analysis of the samples collected on pieces of wallpaper and chips of wood from the floorboard. The investigator gave him two questions to resolve: 1) were these stains and stripes blood; and 2) if they were, then could this blood have been shed two weeks ago? Klein answered both of these questions affirmatively in his protocol.<sup>203</sup> This protocol, in turn and in accordance with procedure, was read aloud at the trial by the chairman of the court (the presiding judge).<sup>204</sup> During their questioning of the physicians, however, the judicial participants paused only briefly on the microscopic analysis itself; subsequent questions ranged from the pertinent to the irrelevant, yet all exhibited considerable curiosity.

The court began in formal fashion by checking the correctness of the methods and conclusions of the pre-trial chemical-microscopic investigation. In addition, the chairman asked whether the blood found was that of a human. While the latter question was beyond the reach of contemporary techniques, the methods still represented the cutting-edge of medical science in the view of the experts.

PROF. LIASKOVSKII: Regarding Klein's methods of investigation I can say only that they are so correct that there remains nothing better to wish for, with regard to both [their] systematic character [*systematichnost'*], and those latest methods, which Klein used. On the second question, I can answer that one cannot positively correctly say that it is the blood of a human; in my opinion, the investigated blood, judging by the conclusions of Klein, can belong both to a human and to other mammals.

PROF. SOKOLOV: I completely agree with the opinion of my venerable colleague.<sup>205</sup>

The full array of judicial actors expressed great interest in the physical characteristics of the blood that was found. The defense lawyer, Prince Urusov, asked the chemistry professor whether the blood originated from an artery or vein. From a different angle, but

equally unknown purpose, a jury member wanted to know about the quantity of blood. Significantly, for our purposes, questioning under this rubric evolved into the issue of who had authority to speak to such questions, and whether it was the exclusive terrain of the physician-specialist.

JURY MEMBER: Does the quantity of blood that was found correspond to that quantity which should have flowed out from the body?

PROF. SOKOLOV: In the investigator's *akt*, it states that quite large clots of blood were found, but there is no mention, even approximately, about their size and weight, and without this information, it is almost impossible to answer the question posed.<sup>206</sup>

At this point, an argument arose over whether to call the investigator to court for clarification of the quantity and weight of the clots of blood that he found. The defense objected, leading to questions about whether special skill was required for such measurement.

JUDGE: Can the investigator, not possessing special scientific knowledge, determine the quantity of blood?

PROF. SOKOLOV: Exactly and correctly he cannot, because for this many conditions are presented. Here one must take into consideration that place to which the blood flowed, because if, for example, the blood poured out into some kind of vessel, then the quantity of it could be determined with precision by weight and size. But as soon as the blood poured out onto the sand, as in the present case, then its quantity can only be determined very inaccurately, and with traces of some extraneous particles, which could significantly increase the weight of the blood.

JUDGE: From your answer can one draw the conclusion that the determination of the quantity of blood is a matter of the specialist, and not the *chinovnik*-investigator?

PROF. SOKOLOV: Strictly for the determination of the quantity of blood, special scientific information is not necessary; what is necessary is only experience....<sup>207</sup>

With this answer, the court determined that the investigator's further clarification about the blood was necessary, and summoned him by courier. When it turned out that the investigator "could not find it," further arguments and delay ensued, but the court ultimately ordered to continue the trial, rather than wait for him.

After the examination of the blood evidence, discussion turned to the circumstances and nature of the injuries themselves. It was only in the final questioning of the physicians that the questions became more pointed, seeking to clarify (or support) the supposition that several individuals participated in causing Volokhov's death.

CHAIRMAN: Was the cut of the body straight or uneven?

DOBROV: Uneven, zigzag.... But during the cutting of the corpse no special strength is required; the cutting was done by a knife and in no way by an axe. Difficulty could be met only during the cutting of the spinal column, but the cut was in a joint, so even for this, there was no special difficulty.

SR. JURY MEMBER: In how much time can one person inflict the kind of injuries that are presented in this case, that is, to inflict the injuries and, besides that, cut the torso into two [*pererezat'*]?

PROF. SOKOLOV: For one person to do this quickly is quite difficult.<sup>208</sup>

SR. JURY MEMBER: But, however, is it possible in an hour?

PROF. SOKOLOV: No, an hour is even little, in particular if one assumes that the cut in the joint was made not by chance.<sup>209</sup>

Picking up on this topic of injuries, the defense lawyer concluded the questioning with an inquiry intended to raise doubts:

DEFENSE: How did the bruise on the left hand occur, from a blow by a fist or blunt end of an axe?

DOBROV: To resolve this is quite difficult. They can be formed even from strong pressure.<sup>210</sup>

Defense lawyer Urusov, clearly adapted to his new judicial role, closed the questioning by asking the jury members to “pay particular attention to this circumstance.”

After more witnesses, and the procurator and defense speeches, the court posed a single question to the jury: Was peasant Mavra Egorova guilty of the premeditated murder of her husband? After ten minutes of deliberations, the jury answered, “No, not guilty,” spelling a defeat for the state procurator, in a case that appeared relatively easy to prosecute from the outset. The large public audience responded to the verdict with loud applause.<sup>211</sup>

Pelikan’s critique of the physicians’ performances in this case coincided neatly with Simonich’s maxim: “Such is the demand of science; such is the task of the expert.” Coming from someone of his stature and influence, Pelikan’s commentary imparted an official imprimatur, legitimacy, and drive to Simonich’s mission to refashion the forensic physician according to the ideals, methods, and image of science. Turning first to police physician Dobrov, Pelikan offered several suggestions to this end. “Given all the diligence with which this expert conducted the investigation and compiled the forensic-medical *akt*,” Pelikan politely began, “he should have paid attention to certain details which would have given his exposition more precision, and consequently, more well-founded scientific significance.” Pelikan added that “under the description of the injuries [in the neck area] it does not state the condition ... of other important parts of the neck ... this would not be difficult.”<sup>212</sup> Pelikan’s critique of Dobrov’s conclusion about the cause of death reflected the same overarching objective. Here, Pelikan advised physicians to present their findings in a manner that conformed with inductive logic, that is, the method of reasoning from particular facts to general conclusion that became associated with scientific inquiry from the seventeenth century up to the present.<sup>213</sup>

Pelikan corrected Dobrov's conclusion along these lines, suggesting that "[i]nstead of stating ... that 'death followed from general and absolutely fatal injuries, inflicted by the hand of the murderer'—would not it have been more correct to first name these injuries and show their significance as absolutely fatal?" The associations that Pelikan wished to be drawn from this manner of presentation were clear enough: "This requirement," Pelikan instructed, "better satisfies the rules of science."<sup>214</sup> Not all physicians got poor marks. Pelikan gave particularly high praise to the physician who conducted the microscopic analysis of the blood stains. "With regard to the chemical-microscopic investigation of Klein, all that remains for us is to congratulate him on his excellent, completely scientific work," which, Pelikan noted, was the "first of its kind in our open proceedings."<sup>215</sup>

### The Case of Elena Karvanen

Two months earlier than the Moscow trial (discussed above), another murder case in which physicians figured prominently took place in the other capital city. A 25-year-old unmarried woman, Elena Karvanen, was accused of killing her child and concealing the death. The case was tried under the new jury court in St. Petersburg on 5 December 1866.<sup>216</sup> The unwed daughter of a worker, Elena arrived in St. Petersburg four months prior to the incident, where she began work as a domestic servant for *meshchanin* Aleksei Iakovlev.<sup>217</sup> The wife of her employer noticed the "fullness" (*polnota*) of Elena's body, and asked her if she was pregnant, to which she answered that she was not. In this way she concealed her pregnancy the entire time she was in their service. On 3 August, having noticed a change in Elena's external appearance, and suspicious that she had given birth, Iakovleva began to search. As part of her search, the next morning, with a candle, she went into the outhouse and noticed a white rag in the pit; upon removing it she saw an infant. She immediately notified her husband, the caretaker (*dvornik*) of the house, and the *dvornik* of the police. The

police retrieved the body of the newborn, and identified the white rag as part of a woman's shirt. Suspicion fell on Elena, and during the investigation of her belongings, the other part of the shirt was found, from which the white rag (which covered the infant) had been ripped off. Under questioning, Elena admitted that she gave birth secretly in the woodshed. She explained that she had never been pregnant before and never given birth before. She stated that when she gave birth to this child, seeing that it was not breathing, she considered the infant dead. Frightened and not knowing what to do, as she explained, she threw the body in the outhouse.

Two medical men were called in for the forensic-medical examination of the body. Serving as the "experts" were the *akusher* (medical assistant in child delivery) of the area, Boreisho, and a private doctor, Sventinskii. The physicians were asked two specific questions that were essential to the case: first, whether or not the child lived after birth, or was born dead; and second, whether the child died from suffocation (*zadushenie*) in the pit of the outhouse, or was already dead when thrown there. The experts answered that the child was born alive, and died of suffocation in the pit. During their external examination of the body, they found the child fully and well developed, with no external injuries on the body, and that the nose and mouth of the child were filled with the fluid located in the outhouse. Upon dissection, they found that the organs were in normal condition, the lungs were filled with air and floated in water, and the intestines were swollen with gases.<sup>218</sup> Based on their investigation, the physicians concluded that the child was carried to full term, and died from suffocation, from the liquid that ended up in its nose and mouth.

These medical conclusions, one year earlier (under the pre-reform system) would have guaranteed a conviction.<sup>219</sup> It would have been an open and shut case. As it was, under the reformed procedure, the case still turned on physicians' testimony, but not in a preordained way. Medical conclusions were still central to the case, but only insofar as they were challenged, discredited, and rendered ineffectual. In this way, the case of Elena Karvanen illustrates the abrupt shift in physicians' status and influence in relation

to changing legal standards and procedure, which I discussed earlier in this chapter. Physicians' new-found bases for legitimacy and claims to authority (making statements of "fact" and presenting "reliable" testimony)—while logically coherent in theory—proved less practicable under the rough-and-tumble of adversarial conditions.

The response of the opposing parties to the physicians' conclusions reflects the conflict and collision between physicians' old and new status. The defense lawyer, a creation of the reform and adversarial procedure, likewise carried out its implications for physicians. Well-adapted to his new role (as in the previous case), the defense lawyer, Arsenev, deftly turned physicians' new procedural status, and their attendant claims to authority, into a liability. At the same time, the case reflected the vestigial alliances and institutional relationships that had formed over the past century and a half under the inquisitorial system: the state's procuracy (which represented the autocracy's legal interests) and forensic-medical service had worked hand-in-hand, as part of the same administrative machinery for managing social order.<sup>220</sup> The prosecution and forensic medicine entered the reformed courts as bedfellows by default.

This former if unwitting alliance was reflected in the simple and matter-of-fact manner in which the prosecution (assistant procurator) supported the physicians' conclusions. In keeping with tradition, the assistant procurator accepted the medical conclusions at the physicians' word. He regarded the medical testimony as a self-evident truth, and presented it to the jury as such.

ASST. PROCURATOR: That the child was alive—in this, it seems, there is no doubt. The testimony of two experts—people familiar with science, who, during the presentation of their conclusions, directly stated that fact [*fakt*], that the child was living—seems completely sufficient, [such] that you could have no doubt in the fact that the child was alive....<sup>221</sup>

By contrast, defense lawyer Arsenev challenged and undermined the value of the medical conclusions, and with it, the physician's



traditional role in legal proceedings. His attack was thorough, encompassing both forensic-medical questions at the heart of the case: whether the child was born alive, and whether the death occurred from the reasons indicated by the physicians. Arsenev deflated the irrefutable status of the physicians' so-called "facts." For each "fact," as he suggested, a different and contradictory fact could be found (and if not, then this defense lawyer did not seem to have a problem making one up).<sup>222</sup> Arsenev also turned the new (lower) legal standard of "reliability"—to which physicians were now held—against them. For a physician to state that an opinion was probable, or a supposition, became grounds to disparage, belittle, and reject those conclusions.<sup>223</sup>

While the defense lawyer assailed all elements of the medical testimony on such grounds, these issues are illustrated most starkly in his assault on the tried-and-true lung floatation test—one of the oldest staples in the forensic-physician's armamentarium.<sup>224</sup> Moreover, in the Russian context, this test was the official means for resolving such questions in infanticide cases; the technique itself was prescribed and detailed in the Statute of Forensic Medicine.<sup>225</sup> In short, the defense lawyer shook the physicians' former status at its core, rejecting the absolute weight of their conclusions, the official sanction of their methods (the Statute), and the indisputable status of a scientific "fact":

DEFENSE: In light of the facts [*fakty*], which were revealed during the inspection of the corpse of the child, which the experts confirmed during the court investigation, actually, it is difficult to doubt that the child was born alive. But if these circumstances are probable to a high degree, then nevertheless, there are facts/data [*dannyaia*] which indicate the possibility of the opposite. In forensic medicine, in this science—which, defining the relationship of medicine to jurisprudence, has an important influence on the resolution of the defendant's fate—there had existed earlier the positive opinion that the fact of life and breathing is confirmed—as experts here confirm—by the so-called "lung test." If lungs, as in the present case, float in water—in this they saw earli-

er unconditional proof of the fact that the child was born alive. In the present time, the best representatives of medicine reject the unconditional significance of this fact. They recognize that the floating of lungs—indicating the filling of lungs by air and consequently, breathing—is an important fact. But along with that, they find that this fact also can be met among infants who are stillborn....<sup>226</sup> In this way, the fact that the lungs floated in water cannot serve as indubitable evidence of the fact that the child was born alive. I repeat that probability speaks in favor of the fact that the child breathed; but this fact in no way presupposes the other fact, that the child was killed violently.<sup>227</sup>

With the same strategy and reasoning, the defense lawyer turned to the physicians' second forensic-medical conclusion, regarding cause of death by suffocation, from the liquid into which the child was thrown. The physicians based this conclusion on the dirty liquid found in the infant's nose and mouth, and traces of it in the bronchi (*vetv'*).<sup>228</sup> After an exhaustive list of routine questions about every anatomical detail of the forensic-medical report, the defense lawyer zeroed in on physicians' new Achilles' heel:

DEFENSE: Judging by everything that you observed, to what degree do you consider it probable that the infant died of suffocation?

BOREISHO: First, in the absence of any other signs of external violence, according to which one could say that the child was strangled or was killed by some kind of sharp weapon. Second, from the presence of the dark liquid, which ended up in the cavities of the nose and mouth, one must conclude, that the death occurred from suffocation.<sup>229</sup>

Parsing the medical testimony, the defense lawyer focused even more tightly on the certainty (or lack thereof) of the physicians' conclusions:

DEFENSE: In the forensic-medical *akt* it is stated that in the bronchi a small quantity of gray colored mucus is found; is this or is it not the same mucus which was found in the nose and mouth of the child?

BOREISHO: One must think that it was mucus in general, which comes off of the surface of the bronchi. But it should be yellow, and this mucus was gray. It is very possible that the gray color of the mucus is dependent on the fact that part of the putrid liquid, which got into the nose and mouth, ended up there, however little, and colored this mucus a gray color.

DEFENSE: In any case, is this only your supposition?

BOREISHO: Yes, but the fact that this liquid got in the mouth and nose, this is true.<sup>230</sup>

Seizing on this casual admission, the defense lawyer used it to introduce a new way of thinking about medical conclusions. He devalued their importance because “none of these circumstances [proposed by the physicians] have unconditional significance.”<sup>231</sup> Addressing the jury, he elaborated on this point by challenging the circumstance:

DEFENSE: ...that in the respiratory passages mucus was found, in which was proposed a trace of the putrid liquid. [This circumstance] is, upon the confirmation of the experts, not more than a supposition and *not an indubitable fact*. Since the experts only assume, then this circumstance *cannot have decisive significance*.... In this way, I can think that suffocation, while it is possible, however, was *not proven with clarity and indubitability*, which alone can serve as the basis for a guilty verdict in a crime so important.<sup>232</sup>

The crux of the difference between the opposing parties was set in relief in their closing remarks. This difference reflects precisely the transition between, and overlap of, physicians' old and new status

in the early years of the judicial reform. In the same way that he opened the questioning, the procurator simply echoed the traditional and unwavering institutional investment in medical conclusions. By contrast, the defense lawyer spotlighted the physician's "fall from infallibility" in the legal setting.

ASST. PROCURATOR: It seems to me that one cannot take away significance [*znachenie*] from the testimony of the experts, as the defense has done. They stated their opinion on the basis of the cumulative circumstances which were discovered by medical investigation.... One of the experts expressed himself directly, that "it is indubitable that the child was living,"—he used precisely these words.... There is no reason to doubt that the child fell into the outhouse alive, because in the bronchi traces of gray liquid were found, which point to the presence of particles of the outhouse, which had gotten into the opening [*otverstie*] of the bronchi, where they could not end up other than during breathing—which continued for as much time as the infant remained alive in this place.

DEFENSE: I permit myself to note that this fact—that the putrid liquid could not end up there other than during breathing—was called by the experts themselves only a supposition....<sup>233</sup>

The court presented the jury with two questions: 1) whether or not the defendant killed the child that she had given birth to; and 2) if she was not guilty of this crime, then whether or not she concealed the corpse. It is impossible to determine the extent to which the defense lawyer (and his undermining of the medical conclusions) influenced the jurors. Notwithstanding this black box, one can safely say that the physicians' conclusions did not shape their verdict. For this reason, the outcome of the case was distinctly different from what it would have been one year earlier, under the pre-reform system. The jury found Elena Karvanen not guilty of infanticide, but guilty of concealment. They also found that due to the circumstances of the case, she deserved clemency.<sup>234</sup>

The critique of this case in *Arkhir*, by physician K. Potekhin, was similar in goal and substance to the other commentary discussed above. In one prong of his criticism, Potekhin advised physicians on how to most effectively use negative evidence.<sup>235</sup> But in the bulk of his commentary, like Pelikan in the first case study, Potekhin suggested that physicians provide more details (thus urging a departure from the condensed, bureaucratic form to which physicians, by necessity, were accustomed). Potekhin's goal was also the same: more detail, his reasoning went, would make physicians' conclusions more convincing. Potekhin directed this advice to all aspects of the physicians' testimony: more physical details about the mucus; more particulars about the birth itself; more specific information about the position of the infant's body when it was discovered; and especially, more details about the lung test, since it served as the physicians' main evidence.<sup>236</sup> "If the experts considered this evidence completely sufficient," he counseled, then the lung test should have been "conducted in all of its details, with the observation of all the rules prescribed by science and law, in order to not allow doubt during the evaluation of such an important fact [*fakt*]." To this end, he offered concrete suggestions: "From the word and *akt* of the experts ... it is not clear to what degree the lungs were specifically lighter than water; whether or not they both rose with identical strength, [upon] being immersed at the bottom of the container; whether or not all the pieces of lung floated at the same level; how dense the lung tissue was; and whether or not a fizzing of foamy blood resulted from light pressure to the cut lung," adding that "[German authority] Casper attaches extremely important significance to the last indication."<sup>237</sup>

Potekhin explained that these details could serve as information for determining how long or deep the child breathed, but the broader purpose was always in sight. "Perhaps the experts, conducting the dissection, did not find it necessary for their own personal conviction to investigate the evidence of the extra-utero life of the child in all its details. Perhaps, as a result of much experience, it was sufficient for them to examine, cut, and place the lungs

in water, in order to have no doubt in the fact that the child lived. But it is a different matter to convince of this truth people who are not familiar with science. Here, it seems, one cannot be satisfied with a superficial presentation of the evidence of a well-known scientific truth, especially since one can expect objections to them.”<sup>238</sup> Potekhin was categorical in his final assessment. “One can say with full confidence that all the evidence presented by the experts, to confirm their opinion about the death of the infant ... was not entirely convincing.” He cautioned further that “Based on [this evidence], not only is it impossible to build a positive [final] conclusion [*zakliuchenie*], but it is difficult to draw even a *reliable* conclusion [*vyvod*].”<sup>239</sup> Revealing once again why this mattered, he concluded that “it is not surprising, and perhaps fortunate, that the jury did not take into account the testimony of the experts....”<sup>240</sup>

This necessarily brief look at physicians’ commentaries in the reform’s first year is not intended to be comprehensive;<sup>241</sup> instead it seeks to demonstrate one of the mechanisms by which the deliberate reconceptualization of the physician’s forensic role, articulated so explicitly by Simonich, was disseminated once the new courts opened, and absorbed into practice. In this regard, the medium was as important as the message. Because it was a government publication, *Arkhir*’s circulation reached state physicians far and wide; it was delivered to the Medical Boards of the provinces, and equally significant, it was free of charge. For these combined reasons, *Arkhir* reached an audience of widely dispersed state physicians, well beyond the stretch of the mushrooming private publications of the capital cities. Aside from distribution issues, the costs of subscription would have been prohibitive to city and district physicians already struggling to make ends meet on their meager salaries. Notwithstanding the explosion of medical publications in the reform period, most of which were published in St. Petersburg, throughout the century there remained a shortage of medical books, let alone new periodicals, in the provinces.<sup>242</sup> *Arkhir*, bridging capital and province, filled this vacuum.

## SCIENCE, COURTS, AND REFORM

While physicians' reconceptualization of their forensic role was, as argued in this chapter, a practical response to procedural changes, it also was inseparable from the broader intellectual and social climate in which it took place, the period historians call the "60s" (1855–1866).<sup>243</sup> In the words of a foremost historian of Russian social thought, "the exaltation of science is the most distinctive feature of the Reform period."<sup>244</sup> Science in this sense came to encompass many things: the practical endeavor and system of positive knowledge, an ideological stance, a philosophical tendency, and various combinations thereof. Besides the "supply side" factors which helped inaugurate the "age of science," there also was demand.<sup>245</sup> The ideology of science served multiple social agendas, in conjunction with the idea of progress that had already laid its roots under the rubric of Hegelian idealism in the 1840s.

The application of science and the positivist ethos toward different political and social ends is a major theme in imperial Russian history that cuts across various historiographical time zones. Though previous accounts describe different poles of the political spectrum, where they all converge is in locating the practical utility and ideological potency of science outside of, and often, in opposition to or at odds with the autocratic system and its institutions.<sup>246</sup> Historians have, in this way, firmly situated the ideology of science in the vast literature that has been devoted to tracing the history of revolutionary ideology and its relation to the intelligentsia, a category defined by attitudes, not social position.<sup>247</sup> Particularly lacking in the literature is consideration of how this scientific ethos was applied to and interacted with state institutions. Addressing this lacuna, my aim is to show how a segment of educated Russians invested this ethos in the reformed judicial institutions, and viewed these institutions as the appropriate vehicles for carrying out the social promise of science and its methods. Scientific materialism was not a monopoly of the radical *intelligentsia*; as I demonstrate, there were reformers in the government

who had also invested in this perspective. What I am suggesting is this indicates that the standard picture of a gap between state and society is artificial in some respects because there are people in the state bureaucracy who share an orientation with the so-called alienated *intelligentsia*.

The tenor and context in which physicians understood and promoted the role of forensic medicine in the new courts intersected and resonated with the major themes of social thought in this period. One dominant theme was that society was perfectible and open to continuous progress, and this progress was identified with the advancement of science.<sup>248</sup> However, in physicians' depictions, the social promise of science did not act in opposition to state institutions, but *through* them. For top-ranking medical official E.V. Pelikan, the improvement of forensic-medical activity in the courts was not narrowly conceived, but understood as the means for the development of Russia's judicial institutions, which themselves were viewed within the grand arc of Russia's historical development vis-à-vis the West. Impressed with a physician's chemical-microscopic investigation in a criminal case, Pelikan observed that "[i]f all forensic-medical *ekspertiza* was conducted in Russia with the same thoroughness and current knowledge of the special matter, then our courts immediately would be put on the same degree of perfection [*sovershchenstvo*] as in other cultured foreign states."<sup>249</sup> For Pelikan, belief in the perfectibility of society through science included a role for the state's judicial institutions.

The realism of science and its empirical approach dovetailed with educated society's emerging interest in and sense of responsibility for social problems, and desire for a realistic understanding of them. The methods of science were to replace abstract theorizing in addressing social problems. This new orientation, however, was by no means the province only of radical thinkers, nor suited exclusively for populist methods. In his 1865 lecture on forensic medicine to Moscow law students, physician Legonin faithfully transposed this new way of thinking, complete with expectations of social benefit, to the reformed judicial institutions: "Turning to our



fatherland, we can only express our wish for the future. With the new reform of our judicial proceedings, in Russia also comes a new life for Forensic Medicine. The new relations between the court and society will soon require from physicians and jurists the study of real, practical conditions of life—information more firm than speculative conclusions, even if they are distinguished by logical exactitude.”<sup>250</sup>

Although the comments of these two physicians, Pelikan and Legonin, vary in phrasing, the broader context in which they situate the role of forensic medicine, and the social stakes they attach to it are similar. Science, and the empirical “in touch with reality” methods it represented, were viewed as essential to—even the essence of—the success of the judicial institutions, which, in turn, were integral to the success of a particular liberal vision of Russia’s future, anchored in legality.

In sum, the rationalist creed was the banner of the 60s. While rationality had been the administrative imperative of Peter the Great’s program of governance and modernization, including his introduction of the inquisitorial system in 1716, a science-based rationality was now an ideological tool for reform in the hands of various social groups. With the abrogation of inquisitorial procedure, its organizing principle of rationality was also eliminated from the legal process. Physicians, on the cusp of reform, positioned themselves to pick up the mantle of rationality and carry this pre-reform legal imperative into the operation of the new courts. As the rational system of proofs dropped away, physicians emerged in its place as the self-proclaimed bearers of rationality and objective overseers of truth. However, the path to this status was neither straight nor narrow nor uncontested, and became entwined with the tensions that arose in the working out of the reform.

This chapter has considered how and why physicians first identified their forensic work with scientific ideals, and, more broadly, introduced the shoots and social promise of the scientific ethos into judicial institutions. In addition, by examining criminal trials in St. Petersburg and Moscow, it has shown how these trends played out

in practice, and to what consequence, under the adversarial procedure of the new jury courts. The striking reversal of physicians' influence in shaping verdicts, as illustrated in these early trials, was a clear indication that if physicians were to retain their former significance in the legal setting, their new status would need to be bolstered by more than terminological changes. Before turning to the operation of the reformed judicial system, we will examine how this process of redefinition also took place in the highest reaches of the state apparatus, in conjunction with the construction of the judicial reform itself.

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## CHAPTER 3

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# Legal Mechanics: Carving Out a New Identity

This chapter analyzes the governmental discussion that shaped the judicial reform as it pertained to physicians. The participants in these debates were physicians and jurists, whose concerns and priorities did not always coincide. The passions aroused in the drafting of the forensic-medical statutes were divisive and generally followed occupational lines. By defining procedural rules and judicial relationships, the framers shaped the physician's official legal role under the reform. In the same process, high-ranking physicians (with the occasional support of some jurists) introduced a new understanding of the physician's identity in relation to, and in the language of, long-standing administrative practices, as well as the new judicial structures and principles.<sup>1</sup>

Deliberations over these statutes took place in two governmental bodies: the Criminal Section of the special commission responsible for drafting the reform statutes (hereafter the Drafting Commission) and the Medical Council, which was the apex of the state's medical administration.<sup>2</sup> Because the Medical Council's discussion sequentially followed that of the Drafting Commission, the Medical Council commented not only on the draft statutes, but also on the Commission's debates over them. Both sets of commentary accompanied the draft statutes to the state's highest legislative body, the State Council, which considered the opinions before making modifications to the draft. Thus the deliberations of these two governmental bodies shaped not simply the draft statutes, but the State Council's reaction to and final tweaking of them. To this end, the debates that I consider in this chapter reveal how and why the

judicial reform, with regard to its forensic-medical aspects, ultimately took the shape that it did.

My purpose is twofold. First, I identify the conflicting occupational priorities that shaped the opposing positions and arguments in the drafting of the forensic-medical reform statutes. I demonstrate how the framers' alternative proposals stemmed from their occupational concerns, rather than the new legal principles that both sides advocated in common. As my second objective, I consider the tensions surrounding the physician's official status that arose out of this process. I argue that these tensions constituted the seeds of professional development for Russian physicians. In their efforts to overcome the majority opinion and protect physicians from adverse forms of state regulation, the dissenting medical camp recast the role of the forensic physician from state functionary to medical specialist.

In its broader structure, this chapter follows the chronology of the legislative process. It begins with an overview of the process and participants, in which I trace the basic phases of the process: the drafting stage (at the Drafting Commission and Medical Council) and the final revisions (at the State Council). The next section analyzes the drafting stage more closely and constitutes the chapter's core. It was during the deliberations of this stage that the commentary was most divisive, meaty, and presented an array of alternatives. The final section examines the State Council's response to the commentary and its consequent modifications of the statutes.

I have organized my analysis of the deliberations according to three separate articles that were under discussion, in order to demonstrate how a common set of underlying themes played out in each procedural question. Thus the chapter's core is divided into three parts: the questions of punishment, discipline, and responsibilities. This format reinforces my argument that the special interests expressed in the debates, particularly by the medical camp, stemmed from the procedural-legislative circumstances that were under negotiation, and shaped the work experience of state physicians.

The primary sources for this chapter are the commentaries of the governmental bodies. My analysis of the Medical Council's comments and related intra-departmental correspondence is based on the archival records of the Medical Council<sup>3</sup> and Medical Department,<sup>4</sup> both of which operated under the aegis of the Ministry of Internal Affairs. The deliberations of the Drafting Commission's Criminal Section appeared in published form in 1863.<sup>5</sup>

## LEGISLATIVE PROCESS AND INFRASTRUCTURE

The creation of the forensic-medical reform statutes involved a detour from the standard legislative path, and incorporated the government's top medical offices and high-ranking physicians. In their preparation, the draft statutes as a whole passed through a number of governmental commissions and agencies, and were subject to commentary at various points along the way.<sup>6</sup> The forensic-medical statutes underwent the same basic steps as the rest of the reform, but because they pertained to medical subject matter, two significant exceptions were made: First, a top official from the Medical Department, physician Nikolai Ignat'evich Rozov, was invited to participate in the Drafting Commission's deliberations over these particular statutes. Second, the Medical Council was involved in the legislative loop, and contributed its opinion on the physician-oriented statutes.

### Participants

What is unique about the drafting of the forensic-reform statutes is that the authors and contributors were trained physicians and jurists, rather than career bureaucrats. The two deliberative bodies—the Drafting Commission's Criminal Section and the Medical Council—shared general characteristics, but had distinct

occupational memberships. Both groups included high-ranking government officials, with practical experience in their respective fields of law and medicine. By the middle of the century, it was the norm for upper bureaucrats in these administrative branches to have previously worked outside of the governmental machinery, building reputations as practitioners and professors before securing their posts.<sup>7</sup> Furthermore, at the upper strata of these two fields, the boundary between government and non-governmental work was permeable, with most high officials remaining active and prominent in their occupational circles. Beyond this common practical background—and as a result of it—the two governmental bodies retained distinct occupational perspectives and concerns that derived from their work experience. Composed of physicians, the Medical Council viewed the statutes in terms of physicians' interests. On the other hand, the Drafting Commission, staffed with the country's top jurists, represented a legal perspective.

In addition to a core of full-time legislators, the Drafting Commission pulled together the nation's foremost legal practitioners and scholars. Besides the twenty-seven permanent members from within the government, outside individuals from different types of legal activity—ranging from university professors to police officials—also participated in the Commission. These external members were invited as experts in their particular specialization or field of work. As distinguished jurist and statesman A.F. Koni described it, "all the best talent from almost all governmental departments—primarily judicial—and from all corners of Russia were called in."<sup>8</sup> As a division of the Commission, the Criminal Section had the same profile: a mix of core members who worked in the state's highest legislative offices, and extra-governmental practitioners, invited for their experience and expertise.<sup>9</sup> With regard to discussion of the forensic-medical statutes, thirty-four individuals participated, all of whom worked in some area of the law, except one.

The notable exception to the predominantly judicial composition of the Criminal Section was a single physician, N.I. Rozov, the



*Anatolii Fedorovich Koni.  
Reflecting his academic status and dignity, A.F. Koni in his St.  
Petersburg study at the end of the nineteenth century.*

Courtesy of the Russian National Library, St. Petersburg.

vice director of the Medical Department.<sup>10</sup> A key participant in the debates, Rozov practiced medicine in the provinces for almost two decades prior to his tenure in the capital as vice director.

Upon graduation from Kazan University in 1845, he embarked on a diverse medical career before assuming his high governmental post in 1862. He was thus fresh out of “the field” when he participated in the drafting of the reform’s forensic-medical statutes.<sup>11</sup>

Another member who deserves special mention is Nikolai Andreevich Butskovskii, for his dual significance: he served both as the Criminal Section’s chairman, and editor of its published commentary. Regarded as one of the central figures behind the judicial reform, Butskovskii lacked formal training in law, but compensated with ample practical experience.<sup>12</sup> After earning a degree and some years of work in engineering, Butskovskii entered the legal field at the age of twenty-eight as an assistant in the Ministry of Justice. Moving up the ladder of the judicial administration, in the early 1850s he served as chief procurator of a Moscow department of the Senate, where he worked for a decade up to his involvement in the judicial reform process. Called to St. Petersburg in 1861, Butskovskii was assigned to the State Chancellery (a staff office under the State Council) to help draft the new code of criminal procedure.<sup>13</sup>

### DEVELOPMENT OF THE NOTES

Under Butskovskii’s leadership, the Criminal Section drafted the new statutes of criminal procedure over the course of eighty-nine meetings, from 13 January through 30 June 1863.<sup>14</sup> At these meetings there was much dispute over points of procedure. Butskovskii chronicled the arguments in a compiled form, entitled *Explanatory Notes to the Draft of the Statutes of Criminal Procedure*.<sup>15</sup> Assessing this work a half-century later, prominent jurist A.F. Koni stated that “these notes not only represent outstanding historical-legal work, but up to now have not lost signifi-



cance as a superb presentation of the different points of view on the essence of the procedural methods and their domestic meaning.”<sup>16</sup> The notes covered the full array of procedural issues that would constitute the new code.

The placement of the forensic-medical statutes within the notes likewise mirrored the framers’ discussion of them. The framers debated and created the forensic-medical statutes in the context of broader concerns and procedural issues that often pertained to other types of judicial actors, besides forensic physicians. As such, the forensic-medical statutes are dispersed under different sections of the notes (and the final code) according to procedural topic, rather than clustered by virtue of their shared medical relevance. It should be noted, however, that it was in precisely such a cluster that the statutes were forwarded to the Medical Council for review. The rules pertaining to physicians were singled out and presented *en masse*, in isolation from the rest of the code.

### The Statutes

The Medical Council received eight forensic-medical statutes in all, which covered a variety of topics and spanned the full range of judicial process, from the pre-trial investigation to the execution of sentences. Some procedures applied exclusively to physicians, while others pertained to “knowledgeable people” (the original legal designation for experts) as a group; however, even in these more general cases, the participants focused exclusively on physicians in their discussions. The statutes addressed the physician’s forensic obligations from different angles. They included: the grounds for the judicial investigator’s invitation of a physician to the investigation (Art. 298); the penalty for “knowledgeable people” for failing to appear at the investigation upon the investigator’s call (Art. 292); the procedure by which forensic physicians were to be held legally accountable for violations of their investigative duties (Arts. 435–37); the administration of an oath to “knowledgeable people” at the court session (Art. 630); the remuneration of “knowledgeable people” called to the investigation or

court session outside of their place of residence (Art. 929); and the alleviation of punitive labor for pregnant or nursing women (Art. 920).<sup>17</sup> Collectively, they defined the physician's status under the new judicial system.<sup>18</sup>

For the purposes of this chapter, I focus on Articles 292, 435–37, and 298. These articles dealt with the topics of punishment, discipline, and the physician's duties, respectively. I have chosen to concentrate on these particular articles because they explicitly address the physician's obligations and inter-occupational relationships, and reveal a cross-section of issues that together shaped the physician's legal role and administrative linkages. In addition, these three provisions pertain to the pre-trial investigation stage.<sup>19</sup> The investigation, for reasons discussed in the following chapter, became the most contentious stage of the reformed judicial process.<sup>20</sup> The remaining articles that I do not address in this chapter pertained to the court trial and sentencing stages. Based on my research, however, I found that the arguments surrounding these remaining articles reflected the same themes and voting patterns as the three statutes examined below.

### The Sides of the Debate

Above and beyond its engagement with the particulars of the statutes, the debate represented a split within progressive, educated officialdom. This split fell largely along occupational lines. Though both sides referred to the judicial principles to support their arguments, battles lines formed instead over purely practical, occupation-based concerns. In context of the Criminal Section, the two sides took the form of a "majority" and "minority." (These terms are both a literal description in terms of head count, and the appellations used by contemporaries.) For each of the statutes under discussion, the two camps aligned in the same way: the one physician, Rozov, represented a small minority, in opposition to an overwhelming majority composed of jurists. Based on this pattern, I refer to the majority camp as the legal side, and the

minority camp—whose views the Medical Council supported—as the medical side.

The two sides based their respective positions on priorities and interests which, this chapter argues, derived from their distinct occupational experience. Their different objectives conflicted, and to a large extent, were mutually exclusive. They can be boiled down to the following opposition that ran throughout (and characterized) the debates: The legal side wanted to ensure the compliance of physicians via administrative forms of discipline, while the medical side strove to shield physicians from precisely those measures.

### *The Legal Side: Majority*

The majority, like the Criminal Section of which it was a part, was composed of the country's juridical elite and represented a legal perspective. Majority status signified more than simply a tally of opinion: the majority prevailed, insofar as their proposals became the actual draft statutes and, ultimately, gave the judicial reform the shape that it had. In this respect, the drafting process operated on a democratic, majority-rule basis. A total of thirty-four members participated in the discussion of the forensic-medical statutes, though not all individuals participated in the deliberation of each statute. Notwithstanding this individual variation, I refer to and characterize the "majority camp" as a single group due to the consistent behavior of its members. First, with regard to affiliation: its members were unwavering in their affiliation with the majority camp; that is, those who espoused the majority viewpoint did so across the board, for all statutes upon which they voted.<sup>21</sup> Second, attitudes: despite the specifics of the various procedural topics under discussion, in each case the majority's position reflected the same, steadfast set of priorities and objectives.

In the eyes of the majority camp, no concern loomed larger than the need for the judicial actors to comply with the new rules of procedure. Though they defended their views by evoking the reform's irreproachable legal principles, such as due process and individual rights, the majority based their positions on a more elementary and

pragmatic consideration: the success of the judicial reform depended on those who would execute its procedures. As such, with regard to the forensic-medical statutes, the majority's top priority was to ensure physicians' compliance with their newly defined judicial obligations. The majority viewed all procedural topics through this lens, and fashioned the statutes in a manner that would, in their opinion, best guarantee this desired compliance. To achieve this goal, and relying on traditional notions of discipline and punishment, the majority chose to implant into the reform tried-and-true administrative rules, rather than formulate new procedures based on the reform's new judicial principles that were supposed to serve as their guidepost.<sup>22</sup> Rejecting foreign examples, the majority looked instead to Russia's legislative past for their procedural models. Moreover, the majority not only borrowed from pre-reform legislation, they pointed to this continuity as something desirable, and justification in itself for their position. In this way, the majority's opinion on forensic-medical matters revealed a disjuncture between their rhetorical support of the progressive, new judicial principles, and their actual approach to questions of discipline and order in the interest of larger objectives (in this case, the reform's success)—even if it meant undermining the principles of those objectives.

#### *The Medical Side: Minority and Medical Council*

On the other side of the debate stood the minority and the Medical Council, who jointly opposed the majority's proposals, and shared an overriding concern for physicians' interests. The spearhead of the minority camp—in some cases, its only member—was physician Rozov, the sole medical representative in the Criminal Section.<sup>23</sup> The Medical Council rallied behind Rozov and his alternatives to the majority viewpoint. Because the Medical Council concurred with Rozov's positions on all statutes, I refer to this side of the debate inclusively as the "medical camp" (encompassing the Rozov-led minority and the Medical Council).<sup>24</sup>

The medical camp above all sought to safeguard physicians' welfare. Unlike the jurist-filled majority, whose overriding objec-

tive was compliance with the new system, the medical camp saw the reform as an occasion and forum to redress physicians' long-standing grievances. As physicians themselves, albeit high-ranking ones, members recognized the vulnerability of the medical practitioner under existing laws. Motivated by local occupational experience rather than imported legal principle, the medical elite pushed for revisions that would bolster the physician's legal status and insulate them as a group from state intervention. More concretely, this side of the debate wanted to protect physicians from undue legal penalties for their alleged violations of forensic duties. It was the damaging, practical consequences of this punitive action—such as financial drain and the stunting of a physician's service career—that spurred the minority's campaign for change.

To justify their proposed revisions, members of the alternative-seeking medical camp invoked the specialized nature of the physician's work. Rather than arguing from a position of bald self-interest, the medical camp claimed that it was the particular character of medical duties that necessitated the procedural changes they advocated. The medical camp camouflaged their special interests in—and in the process, promoted the notion of—the disinterested, esoteric, and civic-oriented character of medical activity. In order to advance their position, the medical camp introduced the concept of the physician's special status.

## THE DELIBERATIONS

These opposing sets of priorities, in the context of the reform, produced tensions with far-reaching implications for the physician's social identity. These tensions can be understood only in relation to the reform's primary objective, which was the separation of administrative and judicial authority. On which side of this newly drawn line would the forensic physician fall? To which type of authority (administrative or judicial) would the physician be sub-

ject? Physicians' occupational violations were, by law, criminal violations. Prior to the reform, the physician was disciplined for these violations by administrative methods. With the advent of the reform and its promise of due process, the question arose: would the physician be entitled to these new rights? The Commission members were confronted with this decision when setting the procedures for the regulation and discipline of forensic physicians.

While both camps passionately supported the reform's new legal principles, they disagreed sharply over whether the forensic physician should be a direct beneficiary of its fruits. The legal camp believed that physicians should continue to be disciplined according to traditional administrative measures. The medical camp argued that physicians should be protected, via the new legal rights, from precisely these measures. This point of conflict was the crux of all disagreement, and in turn, raised fundamental questions about the physician's identity in light of the reform.

Three interrelated themes stemmed from this conflict, and resurfaced in each of the forensic-medical statutes under deliberation. First, was the physician to be regulated by traditional administrative methods in his capacity as a state functionary, or would he be adjudicated as a legal subject who was entitled to due process? Second, were forensic-medical responsibilities under the new judicial system a state-service obligation or a civic duty? Third, was the forensic physician a *chinovnik* (bureaucrat) or a specialist?

While the conflict between the Commission's interests and medical interests came to a head behind the scenes of the legislative process, they did not end once the draft was completed. On the contrary, these conflicts were built into the reform statutes themselves, and played out in the following decades during the implementation of the judicial reform. Rather than marking an end to these issues, implementation only animated the tensions. Ironically, through the defeat of the medical camp and their proposed changes, the seeds of medical professionalization were sown.

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PUNISHMENTARTICLE 292: THE FINING OF FORENSIC PHYSICIANS  
FOR THEIR FAILURE TO RESPOND TO THE INVESTIGATOR'S CALL

Lawmakers sought to ensure the most basic level of compliance from those who served the new judicial system: appearing for duty. Article 292 stipulated that “knowledgeable people,” which included forensic physicians, would be subject to a monetary fine for their failure to respond—in a timely fashion, or at all—to an investigator’s call. Besides establishing the fact of fining, the article also set the procedure for the imposition of these fines, granting the investigator full discretion over the process. In its entirety, Article 292 stated: “Knowledgeable people, upon the request of the judicial investigator, are required to appear immediately. For the failure to appear, without legal reasons, they can be subject to the same legal responsibility as *poniatye* [official witnesses of the investigation].”<sup>25</sup> The procedure and punishment for physicians were modeled after the rules for official witnesses. To better understand the issues involved in the physician-related statute, it is instructive to first examine the debate surrounding the statute from which it derived.

## Broader Context: Witnesses as the Model

The draft code included fining procedures for the two groups that were invited (and legally obliged) to perform official investigative functions: official witnesses and “knowledgeable people.” Notwithstanding differences between these two groups’ judicial function and their respective occupational demands outside of the courts, the procedural rules for ensuring their compliance were identical: punitive action (the levying of a fine) for one’s failure to appear (*neiavka*) upon an investigator’s call.

While the draft’s procedure for punishing witnesses and physicians was identical, the Commission’s voting patterns with respect

to the two groups was not. Seven Commission members opposed the fining procedure for witnesses, but they supported the same procedure when the object of the fining shifted from witnesses to physicians. Because the only variable that changed in the two cases was the target group in question (namely, physicians), comparing the debates over these statutes serves as a revealing “controlled experiment,” and sheds light on the Commission members’ attitudes toward physicians, as well as their objectives. We turn first to the majority and minority positions with regard to witnesses, and then will examine the two sides on the question of physicians.

### Minority

In the case of *poniatye* (draft Art. 287), a minority of seven members opposed the statute because of the power it invested in the investigator. For the seven members, the problem was not the practice of fining *per se*, since the failure to fulfill one’s official service duties was long defined as a minor offense (*prostupok*) under Russian law, warranting a fine. Instead, what the minority objected to was the investigator’s control and discretion over the fining process, which, the minority claimed, undermined the principles of the reform. According to the minority camp, control by investigators violated the reform principles in two main respects. First, it allowed the investigator to act in the capacity of a judge, meting out punishments by his own discretion. Second, the statute denied the offending witnesses the new right to due process prior to punishment. In the words of the seven opposition members, “The assigning of a penalty for this minor offense, by investigators, without any court, in the form of an administrative order, would lead to the violation of the Fundamental Principles of Criminal Procedure rules, according to which no one can be punished without the verdict of the appropriate court.”<sup>26</sup> In short, the minority objected to investigatorial control over fining because, in their view, that type of procedural mechanism was tantamount to the administrative practices of the pre-reform system; and as such, conflicted with the purpose and principles of the reform.



Though investigatorial control over fining was a violation of principle, it was a general mistrust of the investigator that catalyzed the minority's opposition. Quite simply, the seven members presumed that the investigator would abuse his authority. Their wariness was predicated on and reflected the social attitudes of the members toward investigators, as the foot soldiers of the state's prosecutorial arm and the official legatees of police functions. This doubly incriminating pedigree shaped the minority's low expectations of the investigator and, in turn, their opposition to the draft fining procedure. By granting to an individual complete discretion over punitive action, the draft procedure opened the door, in theory, to arbitrariness and the insidious consequences thereof. But when the investigator was added to the equation, the problem moved from the theoretical realm to the practical. "Is any witness [*poniatoi*] in the position to protect the freedom of his activities from the intimidation of the investigator, when he knows that tomorrow the investigator, under one pretext or another, can impose a fine on him?"<sup>27</sup> Thus, at the workaday level, investigatorial control over punitive decisions threatened the core of due process, corrupting the autonomy and independence of the judicial participants. "The designation of penalties by the investigator himself makes the *poniatye* so dependent on him [the investigator], that it is not only undesirable, but to a high degree, harmful." By entrusting the investigator with such authority, the seven members warned, *poniatye* would turn into "mute executors of the investigator's will" rather than "the free and independent observers" that they were intended to be under the reform.<sup>28</sup> To protect the autonomy of participants and justice more broadly, the seven dissenting members proposed to remove punitive authority from the investigator, and transfer it to the courts.<sup>29</sup>

### Majority

Taking the opposite position, a sixteen-member majority supported the statute in the interest of ensuring the witnesses' compliance with their new forensic duty. The majority's overarching priority

was to compel witnesses to respond to the investigator's call, and they believed that the fining procedure, left in the investigator's hands, was an effective means for achieving this goal. The premise of the majority's view was that the efficacy of a punishment was proportionate to the speed with which it was administered after the infraction; the more immediate and swift the punitive action, the more effective in "compelling" the desired behavior. In the majority's words, "Any measure of enforcement is effective only in that case, when the penalty for failure to execute a command acts directly."<sup>30</sup> The majority camp therefore endorsed the investigator's control over fining because it was the most direct means for instilling the punishment. The immediacy of the investigator's reprisal was not only acceptable for the majority, they deemed it preferable to the time-consuming "formality" of due process. "Knowing that a penalty would quickly follow one's failure to appear [upon the investigator's call], the individual who was called forth [by the investigator] cannot as easily choose to disobey, as when the court imposes the penalty—a formality which always leaves the accused with the hope that he might somehow avoid the penalty."<sup>31</sup> Consequently, the majority supported the draft statute on fining, not despite, but *because* it invested the investigator with punitive authority and significant leverage over the official judicial participants he invited, including physicians.

### Voting Pattern

The minority members made a sharp about-face when the object of the fining procedure switched to physicians. Each of the seven members who had opposed the procedure for witnesses, now supported it in the case of physicians—despite the fact that all the particulars, including the contentious issue of investigatorial control, were the same. Given the stark contrast between the minority and majority viewpoints regarding the procedure, the minority members' conversion to the majority position is all the more striking. The same seven members who had deemed investigatorial

control “harmful” to justice in the context of witnesses, evidently did not regard this as a pressing problem with regard to physicians; on the contrary, in the context of physicians, they argued that the investigator’s control was not merely acceptable, it was imperative.

The shift in votes was decisive and dramatic. The head count for the statute regarding witnesses was sixteen (in the majority) versus seven (minority). When discussion shifted to the forensic physician as the potential truant, the gap widened even further: the original sixteen majority members remained in that camp, joined by all of the former minority members—except physician Rozov—to form a dominant twenty-two member majority.<sup>32</sup> This large majority was opposed by a one-member minority. Significantly, that lone voice of dissent was the only physician on the Commission. On the question of fining physicians, the Commission was divided starkly along occupational lines.

The voting shift offers preliminary insight into the Commission’s thinking. Reasoning from mere voting patterns is hazardous, so the conclusions we draw about them must be modest. First, at the most basic level, the shift reveals a differential attitude toward physicians among the seven members who “converted” to the majority position. Second, the voting pattern indicates that the majority of members—who themselves were not physicians—placed minimal weight on forensic physicians’ judicial significance and autonomy, certainly not enough to generate concern over the physician’s insulation from investigatorial influence. Third, for the majority, the forensic physician’s longstanding official identity as state servitor apparently overrode other considerations of judicial principle or special occupational interests. In other words, the Commission supported the extension of traditional administrative methods (for regulating state service groups) into the judicial reform—even though the administrative measures were at odds with the new judicial principles. The majority and minority arguments regarding the fining of physicians, to which we now turn, support these observations.

### Medical Side: Protecting Physicians

Ignoring this broader context of debate, in which physicians were lumped with witnesses, Rozov focused on the unique nature of physicians' work and role. To be sure, at one level Rozov's concerns over investigatorial abuse echoed those expressed with regard to official witnesses. "Under the investigator's command," Rozov declared, the physician "will offer conclusions not according to what fact and knowledge dictate to him, but in accordance with the investigator's opinion on the subject, and his desires."<sup>33</sup> However, Rozov's position differed from the discussion over witnesses in a significant respect: it stemmed from his concern for physicians' material well-being. While the fining statute applied to all types of "knowledgeable people," Rozov discussed the procedure exclusively in terms of physicians, and its deleterious affect on them as a group. To secure a more favorable statute, Rozov argued that the state physician's occupational-legal obligations—in kind and quantity—made his situation unique. By extension, his argument continued, this unique situation rendered the physician an exceptional type of judicial participant, whose particularities should be accommodated in the law.

Assailing the statute from the social rather than juridical perspective, Rozov claimed the statute was unfair and harmful to physicians. Representing physicians' interests, Rozov focused on the real-world problems that an overburdened state physician would encounter under the proposed statute. As it stood, the draft statute imposed penalties on physicians for their failure to respond to the call of the investigator, while at the same time, other laws obligated physicians to perform multiple duties that could easily conflict with the investigator's call. In short, life and law simply did not match. Nobody felt this disjunction more acutely than physicians did—and no one on the Commission besides the one physician spoke out on it. In an effort to protect physicians' rights and welfare, the medical participants (Rozov and the Medical Council) brought this conflict to the fore.

Promoting the medical point of view, Rozov and the Medical Council contended that the physician's occupational demands were

unique in kind.<sup>34</sup> The duties of physicians, Rozov emphasized, “were of such a nature, with consequences so grave, that they did not permit interruption”—even to answer the call of an investigator.<sup>35</sup> Nevertheless, the medical side complained, the draft statute did not take into account this singular aspect of physicians’ work. As Rozov pointed out, medical tasks “such as during the halting of epidemics or the rendering of help to the dying” or “assistance in cases of difficult childbirth, etc.” were not listed in the new procedural code as legally acceptable reasons for a physician’s failure to respond (immediately or at all) to an investigator’s call.

Practical concerns underlay the medical opposition. The reform statute, in conjunction with preexisting criminal laws, placed physicians in a legal Catch-22. The draft article on fining added yet another source of legal accountability that conflicted with the preexisting rules of criminal accountability, which in turn carried their own fines. Elaborating on Rozov’s concerns, the Medical Council argued that the reform statute placed the financially hard-pressed state physician between two different (and incompatible) sources of legal accountability: on the one hand, the judicial reform, “for the consequences of not fulfilling the investigator’s requests due to other [official medical] obligations;” and on the other hand, the preexisting criminal code, “for the obligations of the district physician, who bears legal responsibility for medical-police and therapeutic [*lechebnye*] responsibilities, in addition to his forensic-medical duties.”<sup>36</sup> Keeping an eye on the practical side of this quandary, the Medical Council acknowledged that economically it was in the physician’s best interest to forgo his forensic tasks when they conflicted with other medical obligations, indicating that the “legal accountability for damage or harm to the individual or public interest [when interrupting a medical activity] sometimes entails a *more severe punishment*, than the fine prescribed in Article 292 for *failure to appear* to the investigation.”<sup>37</sup>

The bottom line, for the medical side, was the economic blow that the fining procedure would afford state physicians. A blend of social, legal, and demographic factors magnified the impact of the monetary penalty. To be sure, the size of the monetary fine was by itself a problem for the modestly paid state physician: a single vio-

lation could cost him more than one month's wages!<sup>38</sup> As Rozov stressed to the jurists, "there is no way the district physician can pay the fine from his 194-ruble annual salary."<sup>39</sup> This problem was only compounded by the physician's conflicting layers of legal accountability, and the perils of unrestricted investigatorial control over fining—both of which increased the likelihood of a fine. Finally, this situation was further exacerbated by the distribution of Russian medical practitioners, spread more thinly in the localities than in city centers. "The investigator's control is all the greater the fewer [physicians] there are in his *okrug*; the fewer experts there are, the more frequent will be the [investigator's] demands ... and the physician will become more financially depleted and the penalty of a fine more greatly felt."<sup>40</sup> By this account, it was the average state physician serving the outlying provinces who would be most affected by the draft statute. As such, these complaints were not abstract points of principle for elite medical officialdom in the capital city, but issues of practical and critical relevance for their rank-and-file colleagues in the provinces.

Driven by these pragmatic concerns, Rozov pushed the stakes even higher; he opposed not only the draft's *procedure* for fining forensic physicians, but the *practice* itself. Crossing into the spheres of social and political critique, Rozov extended his arguments beyond the jurisdictional question (of who should have control over the imposition of fines) and the existing parameters of state control. He proposed the more radical step of eliminating the fine for physicians altogether. In so doing, this high-ranking physician challenged the very moorings of autocratic control over physicians. Breaking with autocratic tradition, Rozov proposed an alternative source of motivation (besides fear of punishment) for physicians: moral duty. In Rozov's view, a sense of moral and civic duty—not repressive laws—should and would compel physicians to tend to their forensic duties. But as Rozov argued, this civic sensibility would develop only under conducive social circumstances, that is, in the absence of legal compulsion and punitive controls. In short, Rozov proposed a "carrot" model of social ordering (and in particular, occupational discipline), as opposed to the traditional auto-

cratic “stick” model, supported by the majority (in which penal sanctions functioned as the stick). In short, Rozov linked his efforts to safeguard physicians on a day-to-day basis to a redefinition of the physician’s role in a changing social and political landscape.

Rozov’s proposed revisions entailed radical implications. The elimination of the monetary fine benefited physicians as a group, but at the expense of the state’s grip and administrative control over functions (medical and forensic-medical service) that were essential to the state. Moreover, decriminalization of occupational violations constituted a break with traditional, administrative forms of regulation, removing a key weapon from the arsenal of state control over physicians. Consequently, it reoriented the relationship between physicians and the state. How did Rozov justify such revisions?

### *A Physician’s Moral Duty*

To justify this bold proposal, Rozov cast his argument for revision more broadly—and safely—in terms of common social interests. Though Rozov’s objection to fines was rooted in physicians’ special interests (the concern that the fining procedure would drain a physician’s meager earnings), he argued for decriminalization on more generalized grounds. Appealing to the Commission’s unanimous support of the judicial reform, Rozov argued that the fining of forensic physicians would limit the reform’s success by scaring away the already scarce potential experts in the provinces.

Rozov justified his position not only in terms of homegrown imperatives, but by more provocative reference to foreign models. Rozov challenged the state’s traditional means of instilling compliance among state physicians in favor of foreign models of professional ethos and civil-social principles. Although Rozov, reasoning idealistically, did not justify his call for decriminalization by claiming that attitudes toward traditional autocratic methods had changed and that law should reflect progressive opinion, nonetheless, it was that change which made Rozov’s claim possible. Rozov proposed that civic values should supplant punitive threats as the driving force behind medical service. A physician’s motivation to

perform forensic-medical work under the reformed criminal justice system, “should not derive from law, as a legal obligation, under threat of legal accountability,” but the physician should rather regard it as a “a moral duty.”<sup>41</sup> Looking abroad, he indicated in broad strokes that foreign legislation did not impose penalties on their respective physician-experts, implying that such models—driven by civil-social incentives, rather than punitive disincentives—were preferable to the native tradition. Rather than operating out of fear of legal threat, the physician should be “rewarded by the awareness of his civic duty to assist, to the fullest extent possible, the exercise of justice.” This is why, he continued, “you do not see [such] a penalty in other [countries’] legislation.”<sup>42</sup> In this way, Rozov’s demand for decriminalization combined practical concern over physicians’ economic survival with a call to reorient the physician’s obligations and sense of duty to a civic arena, while evoking European experience and ideals.

Thus, while more pedestrian concerns underlay Rozov’s position (the protection of physicians’ daily means), his actual proposal had more radical implications. Rozov proposed an alternative service ethos based on civic duty, and predicated on an autonomous sphere of occupational activity within state institutions, yet free of administrative intervention. Undermining the bulwark of the state’s traditional approach to regulating its civil service, in order to better protect physicians who were part of that state apparatus, Rozov proposed to remove the teeth from the statute. Substituting a mere suggestion for legal compulsion, Rozov proposed that the draft statute be replaced with the following alternative: “Knowledgeable people fulfill the requests of the investigators, when possible, without delay.”<sup>43</sup> No fines, no threat of penalty, no compulsion.

These were the views, however, of a high-ranking physician for whom the modernization of the state’s legal system took place in tandem with desired changes in the physician’s role and status within that system. For the rest of the Commission, however, this departure from traditional autocratic practice went too far.



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Legal Side

While the medical camp's priority was the safeguarding of physicians, the majority camp (as with the case of witnesses) above all sought their compliance. To be sure, Rozov's proposed model of civic duty elicited no support among the other Commission members. The twenty-two majority members—that is, all voting members except Rozov—quashed Rozov's radical proposal for decriminalization (the elimination of fining) on the grounds that Russian society was not ready for that type of change or foreign model. In this way, they displayed a traditionalist bias when obedience and order were at stake, even in the context of crafting the so-called progressive judicial reform.

For the same reasons that the majority found Russian society ill-suited to foreign models, they found it perforce required traditional, punitive means for managing social functions and occupational norms. Notwithstanding the fact that the bulk of the reform's principles and institutions were modeled after foreign examples, the majority claimed that foreign models were not appropriate in the regulation of forensic physicians. Without rejecting the civil-society model of social organization *per se*, they argued that in this particular area of law, foreign examples did not suit Russian conditions. Acknowledging that “in many foreign law codes experts are not fined for their failure to appear, or for their delayed appearance upon the investigator's command,” the majority nevertheless maintained that “it did not follow that such an approach should be applied to Russia's [social] order [*poriadok*].”<sup>44</sup>

Unlike the change-oriented arguments of the medical minority, the majority defended the preservation of tradition by evoking Russian backwardness. Supporting the draft statute in full (both the retention of monetary fines, as well as investigatorial control over the fining process) the majority argued that the replacement of the Russian model of penalties with the foreign model of civic duty would be suitable only under certain social conditions, that as yet were absent in Russia. In particular, when “a strict sense of civic duty is [already] developed in society, under which there is no reason to expect that the experts would refuse to appear when

called [by the courts].” “It is obvious,” the majority continued, “that in our society, civic life [*obshchestvennaia zhizn'*] has not developed to that extent.”<sup>45</sup> In the majority’s viewpoint, current experience demonstrated and reflected this social deficiency. “One can notice in practice that very often, even under the existence of legal accountability, knowledgeable people [experts] do not appear [when called upon], despite the fact that the [expert’s] investigation serves as the primary means for discovering the truth, and that the failure to appear frequently leads to the obliteration of traces of the crime.”<sup>46</sup> Though the medical side refuted this observation, neither side offered evidence to support their respective claims. Nevertheless, based on this purported absence of a civic sensibility in Russian society, the majority argued that repressive law was still appropriate and necessary for ensuring the compliance of physicians.

The majority’s position was not entirely new in contemporary debates over liberal legal reform. The Commission’s arguments for adhering to tradition and rejecting foreign models strongly echoed the conservative stance towards the introduction of the jury in Russia, a key element of the judicial reform project. Governmental debates over this issue, beginning with the first governmental consideration of the jury question in 1857, were divided along the same lines of reasoning as those examined above, regarding the question of monetary penalties for physicians.<sup>47</sup> One of the most conspicuous opponents of the jury, Count D.N. Bludov, head of the Second Section of His Imperial Majesty’s Chancellery, rejected the importation of the jury on the grounds that Russian society was not sufficiently developed. While admitting the need for a new foundation for Russian law, Bludov rejected as “premature” the idea that the institution of the jury should be a part of it.<sup>48</sup> “It is not easy to imagine the functioning of such a [jury] court when ... the notions of right, duty, and law are so underdeveloped....”<sup>49</sup> Bludov’s position, that Russian society was too underdeveloped to adopt certain foreign structures, was central to the conservative opposition to fundamental social and political reforms.<sup>50</sup>

It is significant for our purposes that the supposedly reform-minded members of the 1863 Commission—who were self-pro-

claimed supporters of the progressive principles of the reform—likewise employed this conservative argument and social vision when it came to questions of regulating medical service, and the social role of physicians. One might conclude from this unlikely overlap of opinion (between opposite poles of the political spectrum), that the notion of reorienting the physician's administrative status and identity was no less, and perhaps, even more radical a proposition to progressive officialdom, than the jury question was to conservatives. As this chapter argues, the medical minority's challenges to these seemingly more prosaic, yet elemental aspects of state regulation and control pushed the envelope for even the most reform-minded officials.

## DISCIPLINE

### ARTICLES 435–37: PROCEDURE FOR ADJUDICATING PHYSICIANS' VIOLATIONS OF THEIR FORENSIC-MEDICAL DUTIES

Competing priorities also split the Commission on the question of disciplinary procedures for forensic physicians. A triad of articles established the rules for adjudicating and penalizing physicians' occupational misconduct. These statutes picked up where Article 292 (discussed above) left off, due to a distinction in the law between the physician's obligation *to appear* for duty, and his obligation *to perform* the duties: the physician's obligation to attend the investigation was treated separately (in the punitive, procedural and organizational sense) under Article 292; while Articles 435–37 pertained to those violations committed during “the execution of his obligations with respect to the investigation,” that is, the work that began once the physician showed up.<sup>51</sup> Despite this demarcation in the law, Commission members were divided along the same fault lines that emerged over the statute on fining. The majority camp wanted to utilize the reform statutes as a tool to ensure physicians' obedience with their newly defined judicial duties;

while the medical minority wanted the reform statutes to provide legal protections for physicians. As with the fining issue, the safeguarding of physicians meant granting them the same rights that the reform guaranteed for all, and in particular, due process.

The procedural rules appeared as three consecutive statutes. The first two articles (Arts. 435–36) set the basic procedure; the third article (Art. 437) provided for those “special” cases that warranted the input of medical authorities.<sup>52</sup> The rules encompassed violations that a physician committed either unwittingly (“oversights”) or wittingly (“illegal activity”).

These statutes shared parallels with the fining statute insofar as they both derived from a broader context, and had similar voting patterns. With regard to voting, once again the majority significantly outweighed its opposition. A majority of sixteen members supported the draft statute, and a minority of three opposed it.<sup>53</sup> On this issue, Rozov garnered a small gesture of support within the Commission. Two prominent jurists S.I. Zarudnyi and Danevskii joined Rozov in the minority camp. The Medical Council fully endorsed the minority’s viewpoint, declaring in its commentary that it “completely shares the opinion of Acting Statskii Sovetnik Rozov” on the issue of disciplinary jurisdiction and adjudicative procedures for physicians.<sup>54</sup> Before turning to the minority and majority sides of the debate, it is important to first examine the origins of the statute.

### Broader Context

Like the fining statute, the reform’s disciplinary procedure for physicians was not created from scratch, to conform to the novel principles of the reform. Instead, it was a composite of preexisting laws and reform-related concerns. First, the framers adopted the form of the disciplinary procedure directly from pre-reform criminal law. Second, the framers tweaked this basic procedure, with respect to jurisdictions, to satisfy an immediate (and familiar) concern: compliance of judicial participants—in this case, police and physicians—with their new investigative duties under the reform.

*Police Chinovniki as the Model*

One might assume that police officials and physicians had little in common when it came to the courts. But the disciplinary procedures drafted for physicians derived explicitly from those designed for police *chinovniki*. Just as the discussion of fining took place in the broader context of *poniatye* (official witnesses), physicians' disciplinary procedures were shaped by the Commission's discussion of police *chinovniki*. At a basic level, the two groups—police and physicians—shared certain characteristics: both performed judicial functions prior to the reform, and continued to play a role in the investigation under the reform. Another, even more salient similarity between both groups was that their obedience to the new procedural statutes was considered essential. For this reason, the legal side wanted to regulate police and physicians in the same manner as one another under the reform.

Prior to the reform, the performance record for police, with regard to their judicial duties, was found wanting. The Commission explained this problem in terms of the disciplinary procedures that had been in place, and their lack of immediacy. In violations of their judicial duties, the disciplinary fate of the police *chinovnik* was not in the hands of the judicial administration, but instead, it was left to his police authorities (*nachal'stvo*). That is, under the old rules, police were not subject to disciplinary action in an immediate sense, by the judicial authorities that they had violated. Thus, in the Commission's view, it was not shiftlessness that led to the slack behavior of police, but a rational and understandable choice made out of necessity. Police *chinovniki*—like medical *chinovniki*—were overburdened with multiple official duties, and as a practical matter, it was “impossible” for the average *chinovnik* to accomplish all of them. Under such circumstances, police simply “followed the orders of those [authorities] who had more power over them,” that is, the police authorities rather than the judicial apparatus.<sup>55</sup> As with the fining statute, for the legal side, the remedy lay in the immediacy of disciplinary action.

While the multitude of police duties did not diminish with the reform, the hopes invested in the judicial system had grown. With the success of the reform at stake, traditional patterns of police lax-

ity now were viewed as detrimental and no longer acceptable. The Commission found it “necessary” to rectify, via the reform, the “abnormal” manner in which police participated in judicial matters. But how could the state ensure that the old police players more diligently follow their new judicial rules? How to avoid the patterns of the past, where police resolved their overload of duties by sacrificing those for which they were not directly accountable, namely, their judicial duties? In the Commission’s opinion, “it will be possible to avoid this evil only when judicial authority is directly responsible for disciplinary penalties and prosecution” over the police for their investigation-related violations.<sup>56</sup> The same viewpoint on punishment—the equation of immediacy with efficacy—that had shaped the majority’s views on the fining procedure, underlay their position on disciplinary procedures.

The Commission applied this approach and thinking to forensic physicians. To be sure, there were certain parallels between the police and medical *chinovniki*. Both served dual administrative authorities. While the state physician was part of the medical-administrative hierarchy, in his forensic capacity he served the judicial administration. In addition, both groups were heavily burdened with multiple state duties, to such an extent that they could not fulfill them all. In this respect, the physician, like the police official, could be expected to sacrifice some of those duties, and the legal side wanted to make sure—via the reform’s disciplinary procedure—that it would not be the judicial ones.

### *Legal Precedents*

While police-related concerns determined the jurisdictional question, the template for the procedure itself came from preexisting laws. To understand the Commission’s selection of the contested disciplinary procedure, it is necessary to examine briefly the legislation that preceded the reform statute, and indeed, served as its basis. The framers retained two procedural vestiges from past laws: First, non-medical jurisdiction over physicians in disciplinary matters; second, a distinction between a physician’s medical (“special”) versus general duties. This distinction, in turn, determined whether or not medical authorities were to be included in the dis-

disciplinary process over physicians. This was the central issue for the medical camp, and the focal point of the Commission's debate. These two legal legacies were intertwined and coevolved within Russian law, to which we now turn.

Russian law established two different disciplinary jurisdictions over physicians in cases of occupational misconduct. In their capacity as physicians, they were subject to the disciplinary authority of the medical administration; as state servitors, they fell under the disciplinary jurisdiction of non-medical administrative bodies. The form of this disciplinary jurisdiction evolved through an accretion of rules in two separate collections of legislation, the Criminal Code and the Medical Statute.<sup>57</sup>

Three overlapping but different disciplinary-procedural models coexisted up to the reform. First, the Medical Statute's 1797 rule (Model 1): under this model, physicians' violations fell under medical jurisdiction; the medical administration had complete disciplinary authority over all forms of a physician's occupational activity, including violations of service duties (including forensic).<sup>58</sup> Second, the Medical Statute's 1829 rule (Model 2): this model established non-medical jurisdiction over a physician's service-related violations.<sup>59</sup> And third, the Criminal Code (Model 3, a modified version of Model 2): this model maintained non-medical jurisdiction over physicians' service-related misconduct, but defined forensic-medical activity as an exceptional ("special") case that required the participation of medical authorities in the disciplinary process.<sup>60</sup> Since the judicial reform statutes pertained exclusively to a physician's forensic activity, this last variant (Model 3) would logically suggest that the framers incorporate the medical administration into the reform's disciplinary procedures for forensic physicians. However, this was not the case.

### At the Crossroads of Reform

At the 1863 meetings, the Commission members were at a juncture, with two separate tracks of options available. With regard to the first track, tradition offered them a mixed bag of legal prece-

dents, to utilize as a resource. Prior to the reform, these three models coexisted as accreted layers of legislation, inconsistencies notwithstanding. But in the construction of a new judicial code, a selection had to be made. With regard to the second track, the framers faced the immediate issues of ensuring physicians' compliance with the reform statutes, as articulated in the Commission's discussion of police procedures (examined above). These two sets of options—legislative tradition and immediate interests—shaped their decision.

With regard to the legislative precedent, the framers adopted Model 3 from the rules of criminal procedure that were rendered otherwise obsolete by the reform. The framers retained the formal aspects of the rule: non-medical jurisdiction over a physician's work-related misconduct, and the division of responsibility (in accordance with the type of duty violated) into "special" and "general" categories. There was no ambiguity among the Commission that this particular rule served as the model for the reform. "In its essence," the majority explained, "this rule (Art. 653, t. XV *zak. sud. ugol.*) was retained in the draft statutes, the only change being that physicians' forensic violations are handled not by provincial boards, but judicial institutions."<sup>61</sup> To understand this "only change" (the switch in jurisdictional setting) one must return to the immediate context of the drafting process, and the Commission's aforementioned concerns over police compliance, which provided the model and rationale for this jurisdictional switch.

The Commission's objective of ensuring physicians' compliance played an equal role in the shaping of their disciplinary process. The framers modified their chosen procedural model to accommodate this priority. Protected by the legitimacy of legal precedent, the framers updated the older law, via some conspicuous and strategic tinkering, to accommodate their desire for a "direct" and expedient form of discipline for forensic physicians. First, they disregarded the inconvenient detail whereby forensic duties were defined as "special" cases (requiring the participation of medical authorities). Second, they shifted the jurisdiction from the provincial administration to the new judicial institutions.

These two threads of influence (legal precedent and immediate



priorities), when intertwined, produced a fundamental inconsistency: by modeling the draft procedure after an *administrative* form of discipline, and then transferring jurisdiction over that administrative-disciplinary process to the new judicial institutions, the framers in effect tried to squeeze square pegs (administrative practices) into round holes (reformed judicial institutions). As a consequence, physicians were denied the right of due process by the same judicial institutions that were introduced in order to protect that right. This tension was not lost on the medical camp, and it generated their vehement opposition to the statute.

### Medical Side

The medical side attempted to revise the procedure in order to incorporate the medical administration at each stage of the disciplinary process. In the medical camp's view, unjust prosecutions, and the damage they entailed, could be minimized by allowing medical authorities to evaluate the physicians' alleged violations. In arguing this position, the medical side delimited forensic-medical activities from other judicial participants and types of state service more generally. Defining forensic-medical practice as a distinct and specialized activity, in turn, enabled the medical camp to insist that physicians' disciplinary procedures accommodate the special nature of their forensic work. In the process, the medical camp recast the role of the forensic physician, identifying him with the nature of his work (specialist) rather than the state's administrative-legal system of categorization.

In form, the minority's criticism of the draft statute about disciplinary procedures echoed their attack on the fining statute: the procedure violated the principles of the reform, and as a consequence, it put the physician in greater legal jeopardy. "Under the draft rules about the legal responsibility of forensic physicians," the minority camp complained, "[forensic physicians] are insufficiently protected from incorrect prosecution [*presledovanie*]." <sup>62</sup> In defining the shortcomings of the draft procedure, Rozov's minority camp enumerated three defects: the statute granted the state

procurator complete control and discretion over the disciplinary process, a preliminary investigation was not required, and the statute's "artificial" distinction between "special questions" (i.e., medical) and general service duties. This latter distinction, inherited from pre-reform law, allowed for and justified the exclusion of medical authorities from the disciplinary process. However, from the medical camp's point of view, the participation of medical authorities constituted "one of the essential guarantees of the correct discussion of the matter."<sup>63</sup> Thus, all three criticisms pointed to the same fundamental flaw: the draft procedure did not incorporate medical authorities, and thereby left physicians' disciplinary fate in the state's (non-medical) hands.

Building on Rozov's critique, the Medical Council denounced the draft statutes in even stronger, moral terms. The Medical Council contended that the draft statute embodied the most odious elements of the pre-reform inquisitorial system. Within the context of the reform process, this was a highly charged criticism indeed, and implicitly barbed with moral imperative. Pulling no punches, the Medical Council argued that the evisceration of a physician's rights under the reform harked back to the unanimously execrated pre-reform system. To this end, the Medical Council's description of the draft statutes resembled a laundry list of the previous system's procedural elements: "Calling the physician to criminal responsibility upon, for example, the investigator's personal dissatisfaction, the collection of evidence by secret police reconnaissance, prosecution without questioning the accused or his knowledge of it, charging a physician without [allowing him the] opportunity to appeal decisions that are incorrect in form and substance—this is a hasty court, which does not provide the guarantees for justice."<sup>64</sup>

In combination, these elements deviated from the reform principles, subverted the rule of law, and most importantly, deprived the physician of a fair evaluation of his case. But what constituted "fair" from the medical camp's point of view? Simply put, for the medical side a fair process meant the evaluation *of* physicians *by* physicians. To be sure, the Russians did not seek the same form of self-regulation enjoyed by their Western counterparts. Their aims

and arguments did, however, represent an attempt to gain a measure of occupational autonomy and individual security within the state apparatus.

### *Practical Consequences*

The medical camp's criticisms of the statute—its violation of judicial principle, and its distinction between “special” and “general” tasks—were not academic. Instead, it was the practical outcomes of these procedural elements that drove their campaign for statutory revision. The threat of wrongful penalties and prosecutions, and the chain of inconveniences such legal action entailed for physicians, was a strong incentive for the advocates of change. According to the minority, the split between a forensic physician's “special” and general tasks was not merely “artificial,” it spawned a host of severely felt consequences for physicians and their livelihoods. Having experienced the consequences of that distinction under the preexisting laws, the medical camp drew upon those practical lessons. “In accordance with the currently active legislation,”<sup>65</sup> the minority argued, “the artificial separation of physicians' service violations from ‘special questions’—by granting the right to penalize and prosecute physicians without the preliminary conclusions of medical-administrative authorities—leads directly to various types of incorrect prosecutions.”<sup>66</sup>

Under the culture of autocracy, the state's web of regulations, by which it organized society and the bureaucracy, inextricably linked a physician's legal predicament to the social and economic realm. A physician's legal problems, whether or not they led to conviction, had a direct impact on all aspects of his livelihood, from his career path to his material survival. From the medical point of view, “The gravity of incorrect prosecution is not expiated by the fact that the accused physician might eventually be acquitted.”<sup>67</sup> Under Russia's legal-administrative culture, having criminal charges brought against one was burdensome in its own right. The minority recalled examples of charges brought against physicians, “in which the period from the time of prosecution to acquittal dragged out for fifteen years. The physician was forbidden to leave the district city, in which it was impossible to earn subsistence by

way of medical practice; meanwhile, deprived of wages, he and his entire family were subjected to the calamity of extreme poverty.”<sup>68</sup>

More than rubles were at stake. Prosecution, the minority argued, also harmed a physician’s reputation. Significantly, what troubled the medical side were the injurious effects on a physician’s status *within* the state apparatus and its workings, rather than outside of it, in society at large (in terms of his patient pool) or among his occupational cohort.

The fact that a person was charged is always entered into his service record and puts an indelible stain on his good name. When he tries to change official posts it continues to serve as an obstacle, due to uncertainty regarding the grounds of prosecution and reasons for acquittal, which are not included in the service record. The severity [of these consequences] increases even more when the defendant’s wages are discontinued or decreased, departure from his place of residence is forbidden, or arrest and imprisonment are ordered.<sup>69</sup>

These concerns further demonstrate how the medical elite’s attempts to identify the forensic physician as a special type of *chinovnik*—a specialist in his own right—were bound to the particular features of the autocratic apparatus in which physicians operated, rather than those incentives and motivations (or emulation thereof) which impelled such claims in Western countries.<sup>70</sup>

“These troubling consequences,” the minority argued, “would easily be avoided by preliminary requests for the opinions of the medical boards [*upravy*].”<sup>71</sup> However, the problem remained: the *exclusion* of medical authorities could be justified as long as the inherited distinction between “special” and general duties existed in law. Thus to justify their proposed revision—the *inclusion* of medical authorities in the disciplinary process—the minority challenged the draft procedure (and tradition) at its core: the “special” versus “general” distinction. As part of their effort to protect physicians against the myriad negative consequences of undue prosecution, the medical camp again promoted the notion that *all* forensic medical duties were of a “special” nature.

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*The Forensic Physician as Specialist*

To justify these revisions, the medical camp redefined the physician's forensic obligations as fundamentally different from other types of administrative service functions; in so doing, they challenged the physician's traditional legal-administrative identity by defining his role within the courts as that of a specialist, distinct from other state servitors or judicial actors. More specifically, to vindicate their demand for the inclusion of medical authorities in the disciplinary process, the medical camp had to demonstrate that forensic-medical work qualified as "special," that is, at once technical and arcane.

The process of redefining the Russian physician as "specialist" spawned from the very legislation that defined the physician as state servitor. The medical side adopted the official legal dichotomy of "special" versus general duties, and interpreted it to serve their own objective. Employing the terms of the state, the medical camp worked with and within the state's official legal categories, in order to ultimately undermine the distinction between them, and justify their revisions. Accepting the legal categories of "special" and "general" duties, the medical side argued that the physician's *forensic* work was intrinsically and inviolably "special." With this move, by the very terms of the draft statute, medical input would be required in the adjudication of *all* forensic-medical violations. Claims of the specialized content of forensic medicine was thus a strategic premise in the medical camp's campaign to safeguard physicians under the reform. It was within this context that Rozov, Zarudnyi, and Danevski, the minority's three constituents, insisted that the law's differentiation of a physician's work into "special" (or medical) and "general" duties was "artificial."

*Forensic Medicine = Medicine*

To say that "forensic-medical tasks were medical" was not a tautology at the time of the Commission's meetings, in mid-century Russia. Far from something that could be taken for granted, it was a claim that had to be proven. Swimming upstream against tradition, the minority argued against the weight of legal precedent,

which (as discussed above) confirmed that medical work was to be regulated and adjudicated on par with all other types of state service. To achieve their aims, the minority had to promote a proposition that was alien to Russian legal-administrative tradition: that it was “impossible” and “artificial” to disaggregate the medical or “special” content from a physician’s forensic functions. The medical side argued their point from various angles, drawing upon a broad range of evidence, from practical examples to the language of the law. To bolster their argument, significantly, the medical camp introduced the more novel claim that not only were forensic-medical *duties* of a “special” type, but so too was the medical *chinovnik* who performed them. In short, they promulgated the view that the physician, working within the judicial setting, was a specialist in his own right.

To illustrate their contention that forensic-medical tasks were specialized and not simply service duties, the three minority members turned to the most common example, the autopsy. In this type of forensic work, a likely charge against the physician was “concealment of a crime,” that is, a physician’s allegedly deliberate failure to identify (in his forensic-medical report) the physical indications of violence. The minority explained that if a physician was charged with concealment of a crime, the allegation could be “resolved in a correct fashion only ... by the path of forensic-medical investigation.” That is, only medical authorities could determine whether “in the given case the signs of violence actually existed” and “that these signs were not mentioned in the forensic physician’s report, or that they were not interpreted correctly by the physician.” In this sense, forensic-medical tasks were not simply on par with other medical duties, but a physician’s misconduct in the judicial setting “all the more” required the “preliminary opinion of medical authorities.”<sup>72</sup>

Yet such examples did not provide blanket protection. For under the statute, it was ultimately left to the procurator to determine whether a particular forensic task qualified as “special.” The procurator thus determined on a case-by-case basis whether or not to include the medical administration in the disciplinary process.

Leaving such decisions to the prosecutorial arm, the draft's disciplinary statutes left room for arbitrariness and state intervention, with the physician's career and well-being at stake.

### *From Functionary to Specialist*

To provide a more comprehensive argument for the *regular* inclusion of medical authorities in *all* cases, the Medical Council further challenged the physician's administrative identity. Pushing the parameters of debate, the medical elite maintained that it was not merely the nature of the physician's *duties* that necessitated evaluation by medical authorities, but the nature of the *physician himself*. Up to this point, the minority had argued that it was the physician's forensic activities that were specialized; the Medical Council took that argument one step further, and associated the esoteric qualities of forensic-medical work with the medical *chinovnik* who executed them. As the Medical Council described it, "the physician's explanation is always obscure for the staff of judges, among whom there are no specialists [*spetsialisty*]." In short, the Medical Council identified physicians as a different breed of *chinovnik*. The very language of the physician was distinct, and could be understood only by his own kind. From this platform, the Medical Council could argue that medical authorities were needed to evaluate not only the physician's alleged misconduct, but also his legal testimony.

To understand the procedural and strategic relevance of this claim, one must refer back to the draft statute. Under the draft rules, there was one procedural element that was required for *all* types of violations, special or general: the investigator was required to obtain "the physician's explanation" in each given disciplinary case (even those that would not warrant the participation of medical authorities).<sup>73</sup> Thus, by transposing the "special" aspect of forensic work onto the physician himself, the Medical Council presented a more all-encompassing rationale for the inclusion of medical authorities, and most significantly, one that would not be subject to the procurator's judgment on a case-by-case basis. In other words, by redefining the medical *chinovnik* as a specialist whose

testimony was inscrutable to all but other physicians, the Medical Council justified the inclusion of medical authorities in every disciplinary case against physicians, and not just for those cases that the procurator deemed “special.” In this way, the identification of the physician as a “special” type of judicial actor served as a means to immunize him procedurally from the arbitrariness of the state’s prosecutorial arm.

### Paths Not Taken

The minority, backed by the Medical Council, proposed an alternative that would better safeguard physicians against undue indictment and penalization. In this alternative procedure, the physician would be adjudicated at once as an individual legal subject (with rights) and a specialist (whose duties reflected an arcane body of knowledge and thus required evaluation by fellow physicians). By promoting these two new identities, which were fused in their recommendations, the minority challenged the draft statute on two key points. First, with regard to the physician-as-specialist: the three-member minority rejected the majority’s provision that the procurator alone (without the input of medical authorities) initiate disciplinary action. In the minority’s proposal, medical opinion was necessary in the evaluation of all charges against physicians.<sup>74</sup> Second, with regard to the physician-as-legal subject: the minority proposed that for more serious charges, the physician be granted a full pre-trial investigation prior to disciplinary proceedings, like any other defendant entitled to due process.<sup>75</sup> In short, the medical camp sought to protect physicians by tempering the procurator’s control over the disciplinary process with the inclusion of the medical administration, and the elements of due process.

The crux of the medical side’s objective, as well as its far-reaching implications, can be seen also at the level of language. Besides the gross procedural revisions discussed above, the medical camp’s choice of words for their proposed statute was equally strategic. Though physicians would remain legally liable for their service vio-



lations under the medical camp's alternative, their variant nevertheless challenged a more fundamental issue: to whom or to what were forensic physicians accountable? The original draft code defined physicians' violations as "omissions or illegal activity," that is, violations of the state's rules and regulations. The minority altered the wording in their proposed article, and in so doing, redefined the physician's missteps as violations of "the rules of law *and science*."<sup>76</sup> This seemingly minor revision—the addition of the two words "and science"—was itself a challenge to tradition. In the immediate context of the reform, this wording had pragmatic and tactical significance. By adding the phrase "and science" the medical camp incorporated the special, scientific component of the forensic physician's work into the legal definition of it. In this way, any alleged forensic violation would, by definition, be a violation of a so-called "special" duty, thus warranting the participation of medical authorities in the adjudicative process. In the broader sense, this change of wording did nothing less than reorient the physician's mission, making him accountable to the laws of science, rather than simply the laws of the state.

In sum, the medical camp's claims of physicians' special status cannot be disaggregated from the context in which they were employed. Though in form they may resemble early steps in the professionalization process that took place in the Western countries, these claims had a distinct meaning and significance in the Russian setting. In the context of legal reform, the assertion of special status stemmed from, and can be understood only in relation to that which the medical camp was trying to avoid. In other words, the medical side promoted the notion of the forensic physician's unique and specialized identity, and advocated a form of medical self-regulation, by virtue of what this position would prevent: leaving the physician's legal fate in the hands of the state's prosecutorial arm (investigators and procurators). It was this aspect of the different draft statutes that ignited the medical camp's opposition, and underlay their position. This concern can be heard sharply in the Medical Council's criticism of the statutes on disciplinary procedures: "From the wording of the draft statutes [437]

one must see that the forensic physician—that is, any physician invited in the capacity of ‘knowledgeable person’ to an investigation—is subordinated, in terms of the correctness and legality of his actions, to the exclusive supervision of the investigator and procurator.”<sup>77</sup>

## RESPONSIBILITIES

### ARTICLE 298: DEFINING THE BOUNDARIES OF THE FORENSIC PHYSICIAN’S DUTIES

While it may not be surprising that questions of disciplinary procedure raised concern over the investigator’s authority and physicians’ legal vulnerability, these issues also permeated the seemingly separate matter of defining the forensic physician’s duties. The delineation of the forensic physician’s domain became a contentious question of occupational boundaries: the statute defined what fell in and, even more divisive, *out* of the physician’s sphere of forensic activity. The statute also determined who had the authority to interpret those boundaries in practice. Instead of being focused on, or even addressing, the substance of the physicians’ activities themselves, debate revolved around the question of investigatorial control.<sup>78</sup> Representing physicians’ interests, Rozov—constituting a one-person minority—rejected the draft’s delineation of the forensic physician’s territory due to the authority it granted the investigator over (what Rozov viewed to be) medical decisions. The Medical Council supported Rozov’s view. In the process of repudiating the legal majority, the medical camp promoted the idea that a forensic physician’s work was of a special nature and the exclusive terrain of physicians.

Article 298 defined the forensic physician’s sphere of activity in positive terms (defining what it *was*, rather than *was not*). It stated: “For the examination of corpses, any kind of injury, traces of violence, the health of the aggrieved party, or the accused himself, the

investigator invites the forensic physician.”<sup>79</sup> However, disagreement arose over what the statute did *not* say, namely, under which circumstances was it acceptable for the investigator *not* to invite a physician. As the Medical Council explained, the article “names the subjects and individuals that must undergo a physician’s examination. However, [it] provides no indications to guide the investigator in the question: under that conditions he need not invite the physician.”<sup>80</sup> The draft code remained silent on this topic, “even though all members agree that the physician is *not always* invited to the investigator’s examination of the denoted subjects.”<sup>81</sup>

### Broader Context: The Designation of Autopsies

Why was it deemed so important to clarify what lay *outside* of the forensic physician’s domain? In this area of procedure, the main practical question for all sides was how to curb unnecessary autopsies, which by all accounts was a common problem. Opinion on the cause, consequences, and appropriate resolution of this problem differed in accordance with the occupational perspective and vested interests of sides involved. Investigators and physicians, in particular, had firsthand experience with the confusion and trouble that this point of law generated. The legal majority (which was divided into two subgroups) believed that the investigator’s authority and discretion should not be limited in any way; in practice this meant that the investigator alone should decide when it was or was not necessary to invite a physician. On the opposing side, the Medical Council backed Rozov, again the sole minority voice, in the view that the investigator’s discretion be replaced by more prescriptive and confining legal guidelines in the reform. The medical camp approached this issue in the same way as they did the other statutes, in two significant respects. First, they proposed revisions that would, in their view, better safeguard physicians from legal jeopardy. Second, they linked their argument for such revisions to claims that physicians’ duties were of a peculiar and exclusive sort, and thus required procedural adjustments.

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Medical Side

The medical side wanted to limit both unnecessary autopsies and the investigator's discretion over designating them—issues that were intertwined in the medical view. While the draft article stipulated circumstances that obligated the investigator to invite physicians, via a trigger-like procedural rule, it said nothing about the flipside: when an investigator need *not* designate an autopsy; by omission, it left that decision to the investigator's discretion. Rozov charged that under the draft statute's wording, the subjects of forensic-medical investigation would be "defined by the investigator himself."<sup>82</sup> The medical camp's objection took two fronts. First, the draft statute did not reflect or accommodate the physician's expertise (in this case, his exclusive ability to detect all traces of violence, or confirm the absence of the same); instead, it granted the investigator discretion over medical matters. The second and related line of criticism, upon which the Medical Council focused, was the physician's legal jeopardy under such investigatorial discretion.

The vagueness of the draft law left ample room for investigatorial discretion over forensic-medical matters. As the medical camp saw it, the statute was flawed both in what it did and did not say. By virtue of these deficiencies, the draft statute, in their view, preserved the most troubling aspect of the pre-reform system. Through its ambiguous wording, the statute allowed for systemic *proizvol* (arbitrariness). "Could the investigator choose *not* to invite the physician in those cases outlined in the law," Rozov challenged, "and restrict himself to his investigation alone?" In a reproving tone, Rozov observed that "Article 298 does not directly decide, but grants [the investigator] the opportunity and the right" to do so.<sup>83</sup> In this fashion, the statute paved the way for arbitrary actions and, as Rozov suggested, thwarted the regularization of procedure, which was one of the reform's intents.

The medical camp sought to limit the investigator's leeway over medical matters through revisions to the statute. Rozov urged that the law provide explicit guidelines for the investigator's actions on

medical issues, in order to dictate the investigator's choices in such cases, and leave nothing to his discretion. In particular, he suggested including in the draft statute a list of specific types of cases—generated by himself, based on medical experience—in which the investigator was *not* to invite a physician.<sup>84</sup> This list would, in one fell swoop, achieve the medical side's trio of goals: to minimize unnecessary autopsies for the physician, regularize procedure, and most importantly, transfer medical decision-making from the investigator to the physician (in the form of the medical camp, who would compose the authoritative list).

But why did it matter? Why was the investigator's discretion over the designation of autopsy a pressing matter for the medical camp? How, if at all, did the investigator's discretion (over potentially medical decisions) affect the forensic physician? After all, one might assume it was in no one's interest to call for superfluous autopsies, including the investigators, for whom it also meant extra, unnecessary work. Why then did the medical camp believe it necessary to pinion the investigator, and restrict his independent action? The Medical Council answered these questions as they addressed the vested interests that underlay Rozov's proposal, while defending it against the majority's attack. We will first examine the majority's position, before turning to the Medical Council.

### Legal Side

The majority supported the draft statute and expressed, above all, an overriding interest in preserving investigatorial control over physicians. While the majority was split into two subgroups of ten and thirteen members each, they were divided over matters of detail rather than substance.<sup>85</sup>

Supporting full investigatorial control, the majority rejected the alleged virtues of special knowledge in favor of good old-fashioned common sense. The ten-member subgroup, including the Commission's two investigators, flatly rejected Rozov's claim that special technical skills were essential in the assessment of a sudden-

death case; consequently, they dismissed his proposed guidelines as “unnecessary” and “confining.”<sup>86</sup> Common sense, not medical technique, could tell the investigator everything that he needed to know. “Why is an autopsy necessary when the cause of death is obvious, [as with] someone who threw himself into the river and drowned?”<sup>87</sup> After all, the legal side contended, “These things happen often among our simple folk [*prostoliudi*], and everyone except the corpse calls for an examination [*osmotr*] and autopsy. Therefore, it is positively harmful to consecrate by law this ritual that is unnecessary for the case and confining for all.”<sup>88</sup>

While the ten members saw no reason to constrain investigatorial control—having rejected the alleged need for special knowledge—they found ample justification for preserving it. In keeping with the conservatism that characterized the majority’s defense of the other draft statutes, the ten members found tradition and precedent their strongest argument for maintaining the status quo. No elaborate explanations were deemed necessary when the minority’s challenge was itself considered preposterous: “since more important rights of authority are given to investigators, there is no need to deprive them of this authority.”<sup>89</sup>

Defending the draft statute, the legal officials pointed to the letter of the law, while ignoring familiar and deeply rooted behavioral patterns in investigative practice that diverged from doctrine. There was no sense in restricting the investigator’s discretion, the majority argued, because in theory, the investigator was not responsible for the type of decisions (basic triage of incidents into criminal and non-criminal tracks) in which such discretion would be relevant.<sup>90</sup> To support their position, the majority referred to one of the new draft rules, which stated that “the police do not inform either the investigator or procurator about any incident that does not contain signs of crime or minor offense.”<sup>91</sup> Relying on this procedural provision, the majority endorsed investigatorial control on the unlikely assumption that doctrine could be equated with practice.

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## Medical Council

Medical Council members were not so sanguine. They did not share the majority's rosy, if disingenuous view in which everyone, from police to investigator, played by the rules. Experience, from the physicians' perspective, proved otherwise. For this reason, the medical camp proposed revisions that would anticipate and accommodate irregularities of practice, in order to better safeguard physicians under procedurally incorrect, but not infrequent, circumstances.

From the medical perspective, deviation from the procedural rules was not an anomaly, it was the norm. But what made this pattern troubling, if not unusual, was the legal burden it placed on the physician. Afraid to accept legal responsibility for terminating a case on their own accord, police and investigators passed the burden along the procedural chain until the "buck stopped" with the physician. The Medical Council described the mechanics of this process:

Whether death occurred from any type of mechanical injury, even if accidentally; or a person died suddenly but the cause of death was unknown; or simply [if] an infant was stillborn and any type of marks appeared on the body, even if only red or blue stains—in all of these cases, which for the most part are not conclusive of criminal activity, the priest will not bury the body, nor will the police give him permission to do so. So finally, the court investigator, to whom the case is then transferred, finds it difficult to bring an end to the case [by his own authority]...<sup>92</sup>

All of this served to bump the legal responsibility down the road to the physician, whom the investigator would invite out of doubt, fear, and uncertainty, rather than just cause.

This pattern of behavior insured all participants—except physicians—against legal accountability. Investigators routinely shielded themselves with quick, physician-certified autopsies; at the same

time, however, they shifted the legal responsibility to physicians, who remained criminally liable for their cursory work. The crux of the issue and the very purpose of the reform, from the medical perspective, was to protect physicians from this “custom.”

In their call for revision, the medical elite once again linked the need for legal change to the special character and imperatives of a physician’s work. Given the harmful legal consequences of police and investigatorial discretion, as experience had demonstrated under current law, the Medical Council backed Rozov’s demand for legislative restrictions on that discretion.<sup>93</sup> Rather than make an outright call for self-serving legal protections, the Medical Council legitimized Rozov’s proposed revisions by claiming that it was the particular nature of physicians’ work that necessitated those changes. Significantly, the Medical Council justified their recommendation in the following way: “*in accordance with the special nature of the case*, the discretionary power of the investigator requires indications in the law....”<sup>94</sup> Once again, by positing physicians’ special status, the Medical Council sought to ensure that the law, and not arbitrary interests, “would guide the investigator and police” in their interactions with physicians at each procedural point of contact, “in the differentiation of incidents of criminal character from accidental and natural, and then, in the invitation or non-invitation of the physician.”<sup>95</sup>

## OUTCOME

How did the medical minority’s proposals fare in the end? Following the deliberations, the draft statutes, as well as the commentaries of the Criminal Section and Medical Council, were forwarded to the state’s highest legislative body, the State Council. In the following section, I identify which recommendations the State Council chose to follow, and the State Council’s deliberate curtailment of certain alternatives proposed by the medical camp.



Historians of the reform have typically glossed over the State Council's final modifications to the draft statutes, depicting them as minor and focusing on the more general fact that the Council adopted the statutes. However, upon examination of the State Council's reaction to the forensic-medical draft statutes and attendant commentaries, this chapter argues that their modifications, while small in size, had significant implications for the medical occupation. The State Council's modifications and rationale demonstrate that in some areas, such as forensic medicine, the reform served as a vehicle for preserving tradition as much as introducing change.

It is clear from their reaction that claims regarding physicians' special identity piqued the State Council. The State Council made a point to address the medical side's claims directly, despite the fact that such references were diffuse and subsidiary to the proposals themselves. Not only did the State Council reject the assertion that the forensic physician was unique in some way, but its members actively attempted to eliminate any such notion from the reform. Utilizing their legislative power, the State Council sought to preempt any hope or intimation that the judicial changes might entail changes in the forensic physician's status.<sup>96</sup> In their own words, the State Council members wanted "[to prevent] any confusion about whether or not the forensic physician, invited to the investigation, is some kind of new official post (*dolzhnost'*) being established under the judicial reforms...."<sup>97</sup> To clarify the matter in a definitive way, the State Council inserted an additional statute into the reform, to define precisely who and what a forensic physician was. For this purpose, they employed a legal definition dating back to 1797, that was reproduced, edition after edition, in the Statute of Forensic Medicine.<sup>98</sup> The State Council transposed this original definition verbatim, ordering that "the rule must be expressed in the following way: 'The responsibilities of the forensic physician are assigned in districts to district physicians and in cities to city and police physicians....'"<sup>99</sup> With the inclusion of this old rule, the State Council inscribed their own view in law, while sending a message that was loud and clear: as before the reform,

the forensic physician was a state servitor—nothing more, nothing less—who, along with his forensic functions, assumed no heightened significance in light of the judicial reform.

The State Council's positioning of this clarification is also revealing. The legislators implanted this early-century definition directly after the article that defined anew the forensic physician's duties, and the circumstances under which he was invited to the investigation (draft Art. 298, discussed above).<sup>100</sup> This antiquated guideline was now permanently affixed to the updated definition of forensic-medical activity, like a stubborn reminder that nothing had changed. The State Council chose that location, they explained, "in order to indicate precisely the procedure [*poriadok*] by which the investigator invites one or another physician."<sup>101</sup> Indeed, the 1797 rule stipulated the obligatory, state-defined criteria for selecting a forensic physician. By positioning it where they did, the State Council reinforced the continued relevance of the state's system for organizing the medical occupation and its service in state institutions.<sup>102</sup> At the same time, the members precluded other criteria that existed outside of the state's official grid from being relevant in the selection of forensic physicians—namely, the criteria of specialized skills and knowledge as evaluated by sources other than the state system for allocating service titles. For the State Council, the physician was not, as the medical camp had implied, a special occupational breed, deserving of special treatment under the law. It is significant that the State Council deemed it necessary to impose this official view through law. Reacting so strongly to the medical camp's arguments, the State Council revealed how the earliest stirrings for occupational autonomy and efforts to redefine social categories—even, and perhaps especially for those groups that worked within the state—generated broader ripples within the uppermost reaches of the autocratic system.

Rather than prevent change as intended, the State Council's newly inserted rule ran against the grain of transformations already underway. Salvaged from older legal codes, this rule did not reflect contemporary medical or legal developments. Instead, the statute reflected the circumstances under which it was created. First, leg-

islative: in its original context, the statute pertained almost exclusively to forensic autopsies (as opposed to the broader range of forensic-medical functions encompassed by the reform, including the examination of mental condition). State physicians received basic training in the conduct of autopsies; as such, the official service criteria for choosing a physician was appropriate in that original, more limited forensic context. Second, intellectual and institutional: in late eighteenth-century Russia, forensic medicine (and medicine in general) was a relatively undifferentiated academic field. The state physician was trained in this general body of knowledge (which only later, in the second half of the nineteenth century, developed into the separate academic specializations and sub-fields of psychiatry and forensic medicine). Under these former circumstances, city and district physicians were adequately qualified by contemporary standards to serve as forensic physicians. And third, political and ideological: physicians initially served the state's police-administrative system, rather than an independent judicial system, which embodied a new set of ideals. All of these early conditions had changed by or during the period of reform in the mid-nineteenth century.

Whose proposals did the State Council support with regard to the specific statutes under deliberation? In light of their reaction to the "special status" issue, it is hardly a surprise that the State Council sided with the conservative majority across the board, on every question of forensic-medical procedure. The lawmakers approved, virtually unchanged, every draft statute that the majority endorsed. Conversely, not one of the minority's alternative proposals made it past the State Council. The government's highest legislative body would brook no change that challenged traditional means of discipline and administrative control over its service occupations.

The State Council's reasoning reflects the same priorities and inconsistencies that characterized the legal side's positions. At the crossroads of reform, confronted with a choice between the majority's proposals that adhered to legal precedent, and the minority's proposals that offered alternative paths, the State Council fol-

lowed the conservative route every time, on each statute. And like the legal side, the State Council's actions reveal a disjunction between their reform-minded rhetoric (and advocacy of progressive legal principles) and their hidebound approach to questions of the physician's occupational identity.

## CONCLUSION

Historians have demonstrated how the medical profession in Western countries, and the so-called "liberal professions" more generally, developed out of free-standing guilds, with relative independence from the state system.<sup>103</sup> Historical accounts of the Russian professions have tended to rest on an implicit comparison between imperial Russian developments and this Western model.<sup>104</sup> In these accounts, historians have relied on Western experience as a standard by which to measure Russian developments; in keeping, these scholars have located the origins of Russian professional development outside of the state's bureaucratic structures. Moreover, such interpretations have viewed the extra-governmental expressions of this activity (periodicals, societies, and associations) as the site in which professional identities developed in tandem with a growing opposition towards the state.

In contrast to this received picture, this chapter has suggested how physicians began to carve out a new group identity within the state apparatus. Russian physicians' perceptions and promotion of a "special" occupational status grew out of and acquired meaning within the legal-administrative and social circumstances that were peculiar to imperial Russia's state-service bureaucracy. Top-ranking physicians tailored their claims and objectives to the state's system of privileges and punishments. Rather than challenge that system *per se*, these physicians sought to fashion a specialized and more secure niche for themselves and their occupational cohort within it. In the context examined here, the very notion of a "spe-

cialist" was, in its origins, understood in terms of procedural rules, regulations, and intra-bureaucratic relationships. While acutely aware of Western developments, Russia's medical elites employed notions of moral duty and posited the unique and esoteric nature of forensic-medical work in an effort to secure basic legal protections for their colleagues of lower rank. They did so in order to insulate physicians from administrative interventions, and the practical consequences such interference entailed.

As this book argues, physicians redefined their group identity in conjunction with and in response to the legal reform process writ large. The construction of and debates over the judicial reform statutes themselves were one aspect of this. The drafting process brought together physicians and jurists, conflicting occupational experiences and priorities, deeply rooted disciplinary traditions, legal precedents, and the new principles of the reform. Out of this mix emerged the central and pervasive question of whether the physician had a new status under the revised judicial system. The members of the Drafting Commission and the Medical Council grappled with this issue in their deliberations over the reform's forensic-medical statutes. Through their negotiations over various legal procedures, the medical participants attempted to alter their group's administrative linkages, redefine occupational relationships, and in the process, chisel out a new role and identity for the physician under the reform. For these high-ranking physicians, the notion of a special occupational status developed in combination with the shaping of the statutes, insofar as this process crystallized long-standing discontents, and provided an impulse and occasion to articulate practical concerns. This development was bound to the specific context of the judicial reform in two significant ways. First, this process exposed and solidified a sense of shared occupational interests and distinctive legislative needs among the country's most influential physicians. Second, the Fundamental Principles of the reform afforded physicians a set of tools (both rhetorical and concrete) with which to formulate, legitimize, and potentially secure their demands.

The medical officials' claims for special status generated a res-

ponse from the State Council, but not the one that they wanted. The State Council not only rejected the medical side's proposals, they went out of their way to include a statute that reinforced the traditional identity of the forensic physician as a state functionary. By dismissing the medical camp's recommendations, and suppressing any hint of change in the statutes, the State Council guaranteed the opposite result: that the tensions voiced throughout the deliberations would play out in the public arena of the courtroom. Once transferred to day-to-day legal proceedings, these conflicts would encompass and directly affect the vast ranks of state physicians, who were all potential forensic players.

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## CHAPTER 4

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### Criminal Procedure in Social Context

Unlike the rest of Continental Europe, the procedural role of the forensic-medical expert in Russia was not fixed. Recent historical scholarship on forensic medicine considers the way in which different European legal systems fostered, inhibited, and produced a particular system of legal medicine.<sup>1</sup> In her comparative study, Catherine Crawford analyzes the ways in which the contrasting features of the English and Continental procedural contexts shaped the respective development of forensic medicine, measured in terms of the corpus of forensic-medical literature produced.<sup>2</sup> Focusing on the different systems of proof, Crawford convincingly demonstrates that the Continent's Roman-inquisitorial rules of formal evidence fostered and encouraged a larger body of forensic-medical writing than in England.<sup>3</sup> Significantly, her analysis focuses on fixed procedural systems. To understand the development of forensic medicine in Russia—and the emergence and shape of forensic psychiatry—it is necessary to extend the scope of analysis to the social and political interests that animated debates over the procedural context itself. This chapter examines statutory procedure and its social setting.

After the reforms, Russian criminal process consisted of two stages, the pre-trial investigation and the court session. In those cases that involved medical testimony, experts were obligated to participate at both stages. The court session was almost exclusively the site of Western-oriented innovation; it was the public jury trial alone which embodied the reformers' ideals, replacing written with oral testimony, inquisitorial with adversarial procedure, and

introducing an independent judiciary and jury verdicts.<sup>4</sup> Altering the principal features of pre-1864 Russian justice, the new judicial order above all sought a previously unknown measure of fairness—basic equity and even-handedness in resolving disputes at law, and fundamental respect for the individual as a subject of the law. Conversely, the investigative stage was a holdover from the pre-reform inquisitorial system, which retained many of the defining features of the pre-reform system that were antithetical to the ideals of the judicial reform, and an anathema to the civic elite. Forensic medical responsibilities bridged both stages, and the question over the physician's procedural status was just as pressing, if not more so, with regard to the pre-trial, behind-the-scenes investigation.

This admixture of vestigial procedural norms and state prerogatives (in the pre-trial investigation) and Western-derived institutional innovations (in the court session) produced what historians refer to as a “mixed” system. This “mixed” character was enacted at the social level as well, in the form of the legal practitioners who filled new procedural roles and occupational posts of the state's judicial institutions. The occupational relationship between these legal practitioners and forensic physicians was an enduring source of tension. These procedural relationships were formally rooted in the statutes that prescribed the respective and intersecting activities of medical and legal practitioners. Before turning to this procedural legislation, it is necessary briefly to examine the social and institutional origins of the legal personnel in the judicial hierarchy, with whom physicians interacted when called upon by the courts.<sup>5</sup>

## JUDICIAL ACTORS

Besides the fishbowl effect of judicial *glasnost*, the reform statutes further altered the social world in which physicians performed their official duties. The new but highly formalized set of procedures that defined the duties of physicians created complex rela-



tionships between physicians and different occupational groups within the legal profession. By virtue of their obligation to participate both in the preliminary inquiry and the court session, physician-experts interacted with a cross section of the legal occupation, which the judicial reform statutes also reconstituted. As a result of this reconstitution, the profession's profile was in part a creation of the reforms (in both statute and spirit), and in part remained the inherited servitor of the state.

The Russian legal profession, like any other, was not a monolithic whole.<sup>6</sup> However, unlike other emerging professions in late imperial Russia, the occupational strata of the legal profession were fragmented into increasingly diverse interest groups. The variety of occupational transformations that the reform engendered included the creation of entirely novel judicial posts and institutions from scratch, such as lawyers (*prisiazhnyi poverennyi*)<sup>7</sup> and the Russian bar (*sovet prisiazhnykh poverennykh*);<sup>8</sup> the reorientation of preexisting posts in accordance with the new procedure, such as the independent judiciary and the procuracy (the office of the state's prosecutors);<sup>9</sup> and the introduction of what I refer to as "hybrid" posts, which, while new in name and legal-training requirements, inherited virtually unchanged pre-reform functions which prior to the reforms belonged to the police, such as the judicial investigator (*sudebnyi sledovatel'*), who inherited police functions. With no prerequisite qualifications for employment in pre-reform courts, the earlier incarnation of the legal profession was a mixed lot. Legal historians typically dismiss this period by evoking a shared depiction of it, in which the only common ground among those who worked in the law courts of the early nineteenth century—chancellery clerks, judges, procurators, and attorneys—was a penchant for bribes and ignorance of the laws or rule-decisions applicable to the case at hand.<sup>10</sup> However, nineteenth-century trends worked in the opposite direction. As the number of legal graduates increased in the mid-nineteenth century, judges and court officials were increasingly appointed from among trained jurists.<sup>11</sup> Nevertheless, as Wortman demonstrates, most judicial posts, particularly in the lower and provincial courts, were held by untrained officials. *Striapchie* (state attorneys, less

politely known as *iabedniki*, meaning slanderers) were lay representatives of parties to a court action; with few exceptions, anyone could act in the capacity of a *striapchii*.<sup>12</sup> On the whole, as historian Brian Levin-Stankevich sums up, the legal occupation was “unorganized, unevenly educated, and unregulated.”<sup>13</sup>

Prior to the reforms, a combination of developments relating to Russian law generated the need for officials with legal training, and in turn, served as the impulse for the state’s institution of legal education.<sup>14</sup> The first development, broadly defined, corresponded with the seventeenth- and eighteenth-century shift from the obligation-based definition of a legal subject to a rights-based (private law) understanding. Since the Muscovite period, the dominance of public law left Russia with little in the way of a native private law tradition. This shift necessitated the establishment of a national law to regulate the private (personal and proprietary) relationships of those individuals entitled to exercise individuals’ rights. Besides being one of the driving forces behind the attempts under Nicholas I (1825–1855) to codify the laws, this turn in legal development also spurred the importation of European experts in private law. These European experts, recruited to staff the law faculties established in the early nineteenth century, left a Western imprint on the development of Russian private law. As a result, Russian private and to some extent public law was infused with legal concepts worked out in Continental Europe over centuries of interaction between received Roman law and native legal custom. Consequently, special training in the foundations of European law was necessary for those who worked in those governmental offices and agencies subject to the rules of the law code. As a parallel development, the state sought to formalize the operation and procedures of its own administration. The tendency to depersonalize administrative activity through public (administrative) law and define intra-governmental relationships more precisely also generated the need for increasing numbers of individuals formally trained in the law to staff administrative offices.

The combined effect of these developments contributed to the state’s burgeoning need for technically trained state officials. In addition to the importation of European specialists—the tradi-

tional means by which tsars filled intellectual-technical voids in Russia—these changes within the state bureaucracy led to improvements in native legal education. Earlier attempts to improve the educational status of state officials led to an increasing presence of non-nobles—a disconcerting situation from the point of view of the autocracy and nobility. To satisfy both the practical and political imperatives of the state, that is, the production of a socially privileged, politically loyal, technically-trained cohort to staff the central state administration, Nicholas I established the School of Jurisprudence (*Uchilishche pravovedeniia*), and restricted admission to the nobility. While the type of training, under state curricular control, was still catechismal, the first generation of mainly European professors, as Wortman has argued, instilled a respect for the law and *esprit de corps* among the first generation of graduates, known as *pravovedy*.<sup>15</sup>

The central governmental institutions, rather than courts, were the initial beneficiaries of the new pool of graduates.<sup>16</sup> The *pravovedy* rose rapidly in the central agencies of the government, by virtue of their hereditary rank, family ties, and accelerated acquisition of higher state service grades through education. These graduates advanced to key positions particularly in the Ministry of Justice, the departments of the Senate and the Codification Commission. Also joining their ranks were graduates of the new university law faculties, who were generally sons of high and intermediate rank civil and military officials. Working together in the ministerial bureaucracies, these graduates shared a common ethos of dedication to the law and vocational purpose, which gradually superseded other allegiances. It was this element of state officialdom which, under the leadership of trained legal specialist S.I. Zarudnyi, comprised the majority of the State Chancellery, which (as examined in the preceding chapter) was responsible for drafting the court reform.

The court reform of 1864 mandated that courts be staffed with trained jurists.<sup>17</sup> To ensure that only qualified individuals served in decision-making positions, the authors of the reform established educational and experience-related requirements for juridical activity and judicial offices.<sup>18</sup> Requirements for judicial and pro-

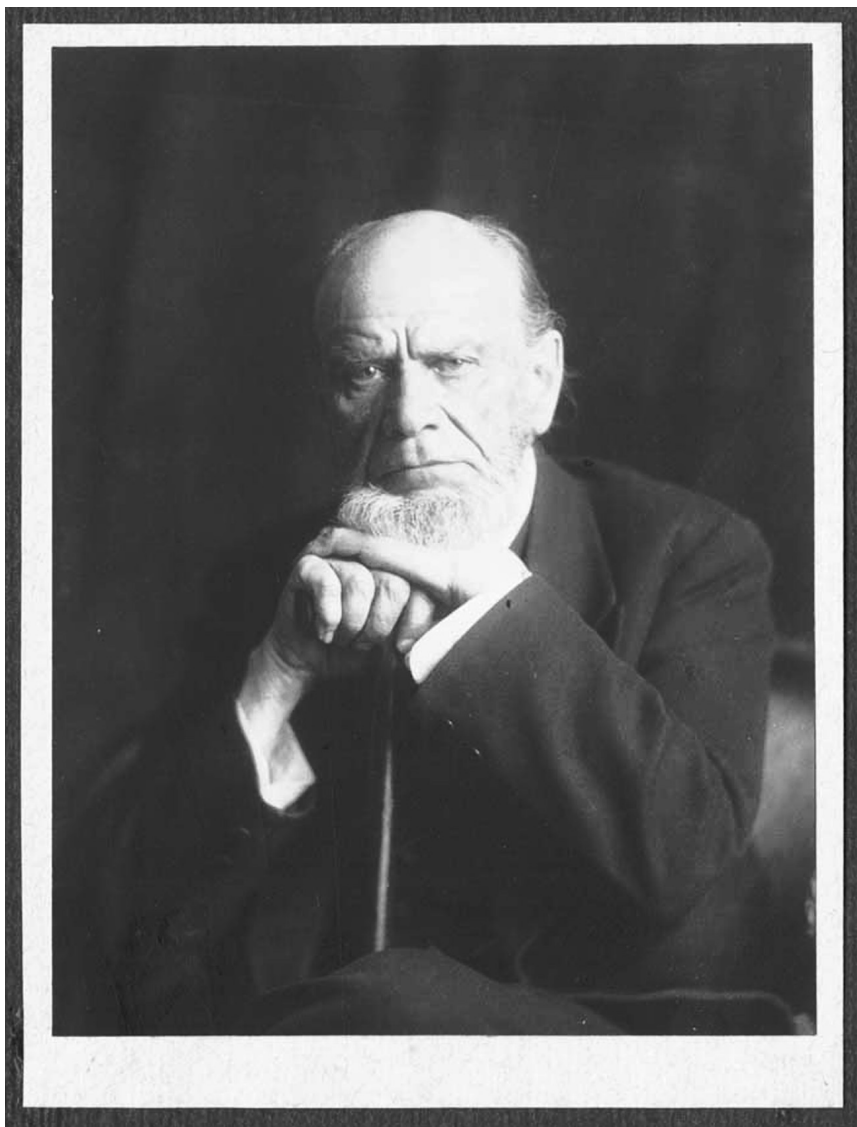
secutorial service restricted appointments to these positions to persons with a higher legal education. The reform also established requirements relating to years of experience in the legal professions necessary for advancement to more responsible positions in the judicial prosecutorial service.<sup>19</sup> All post-reform legal positions required the law degree. There was no distinction in Russian between the training of students who eventually opted for careers in the judiciary, the procuracy, or in private practice as attorneys.<sup>20</sup> Indeed, the terminology which legal practitioners used to refer to themselves, and the educated public also adopted, reflects a shared vocational identification. While some practitioners simply used their official occupational titles, more often, lawyers, judges, procurators and legal academicians referred to themselves as *iuristy* (jurists), a term connoting the scientific and intellectual elements of jurisprudence, which cut across specific legal occupations.<sup>21</sup> However, as much as a shared educational background may have contributed to an initial *esprit de corps*, upon graduation different occupational posts refracted the corps along increasingly divergent institutional interests.

Legal specialization, Levin-Stankevich notes, was usually the result of personal preferences or luck.<sup>22</sup> Occupational stratification began only upon graduation, and even then, there was much dabbling as one ascended the career ladder. Further encouraging this practice, qualifications for higher court offices and central state agencies could be met by service in either the judiciary or the procuracy. As a consequence, there was a great amount of crossover between the two. As historian of the ministerial bureaucracy Daniel Orlovsky has described, an ambitious legal graduate wove his way through and up the court system, from province to province, culminating the professional climb at the pinnacle of the judicial hierarchy, the central governmental institutions. In Orlovsky's words, "[a] typical pattern of office-holding might include a first position as an assistant secretary in a circuit court [*okruzhnyi sud*], then as a judicial investigator for that court, next into a prosecutor's office in another province, followed perhaps by the same post elsewhere. At this point, the official might move

into the courts themselves as a 'member,' interspersed with periods of service at higher prosecutorial levels."<sup>23</sup> The final leg of the climb would bring positions such as chair of a circuit court, followed by membership in a judicial chamber (*sudebnaia palata*) or recruitment into one of the Senate departments or the central Ministry of Justice.<sup>24</sup>

The typical zigzag of this career track, in conjunction with the relatively small number of legal graduates (in relation to the number of new courts and legal faculties), produced significant overlap between practical and theoretical juridical actors that was particular to Russia. To a certain extent, the legal profession folded in upon itself. This type of overlap of supreme court decision-making and practical-jurisprudential expertise was unique among European civil law systems, where often state legal service was a separate career path, distinct from academic employment or private law practice.<sup>25</sup> In Russia, by contrast, jurists in the Senate Cassation Departments were distinguished members of a singular, embryonic legal world.<sup>26</sup> They served as adjunct professors at law institutes and university legal faculties, and at the same time they were the most prominent members of the law societies which mushroomed in most university towns.<sup>27</sup> Many Senators were among the most prolific writers on law, and most frequent contributors to legal journals. As a consequence, for example, an individual whom contemporaries considered as a leading specialist on and proponent of forensic-medical expertise, such as jurist, statesman, and eventually Chief Procurator (*Ober-Prokuror*) and Senator A.F. Koni, was also the same person who wrote Cassation decisions on that issue.

Despite this overlap, some historians have analytically cleaved the profession into two major subgroups: lawyers and state legal professionals.<sup>28</sup> However, the reform produced other, and for our purposes, more significant distinctions within the group Levin-Stankovich labels "state legal professionals." Namely, links between investigators and procurators with the state administration ensconced these occupational posts even more snugly in the state machinery and hitched their professional fates more directly to state interests. This relationship is all the more striking when one



*Portrait of Anatolii Fedorovich Koni,  
St. Petersburg, 1921.*

Courtesy of the Russian National Library, St. Petersburg.

considers that after the reforms, in principle, the courts were bureaucratically separated from the state administration. Yet in practice there remained both a statutory and informal relationship between the two via the Ministry of Justice, which Orlovsky describes as “the power center of the Russian state.”<sup>29</sup> Formally, with only one exception, all correspondence between the Ministry of Justice and the courts was carried out through the offices of the state procurators attached to the courts.<sup>30</sup> This bureaucratic separation was diminished with an 1885 ruling whereby the Ministry acquired greater freedom of action in dealing directly with the judiciary and in bypassing the organizational formalities. The minister could thereafter intervene more extensively than before in jury composition, court agendas, and the judicial behavior of lower court judges.<sup>31</sup> However, up to that point, in the reform’s first two decades, procurators were the main channel between the central government and the courts. And while the Ministry of Justice could not directly influence the activities of the court, it did wield considerable power over judicial personnel, primarily, procurators and investigators.

## THE PROCURACY

The fusion of the Russian procuracy with state administration began with its inception in the eighteenth century and lasted throughout the imperial period. In the words of one historian, “[o]f the institutions of state power, the procuracy has always been one of the most reliable and loyal to the regime.”<sup>32</sup> The introduction of the procuracy, an institution borrowed from Europe, dates back to the reign of Peter the Great, in a time when Peter’s travels and studies of European governance exposed him to various forms of special supervisory bodies.<sup>33</sup> Though it bore a French name, the Russian procuracy was Peter’s creation, a unique amalgam of elements from the French Procurator’s office, the Swedish Om-

budsman, the Swedish and German Fiscals, as well as Russian invention. Generally stated, the Russian procurator's main function was supervision over compliance with law by the body, usually administrative, to which each procurator was attached. Throughout the eighteenth and most of the nineteenth centuries, the succession of tsars modified the supervisory role of the procuracy, and its authority correspondingly ebbed and flowed.<sup>34</sup> Overall, however, as historian of the procuracy Sergei Kazantsev explains, the significance of the procuracy for the supervision of legality remained minimal, as the procuracy was responsible only for the forms and procedures of government.<sup>35</sup> As such, between the reigns of Peter I (1682–1725) and Catherine II (1725–1796) the procuracy represented little more than “a sort of fifth wheel in the cart.”<sup>36</sup> Significantly, however, rather than being a servant of the law (as in France), in Russia procurators became servants of the autocrat. Created as an overseer of the autocracy's interests, the procurator's primary allegiance to the state remained the office's sole constant and defining feature throughout its various incarnations since its inception, including that born of the 1864 reforms.

The judicial reform fundamentally changed the role of the procurator making him both a prosecutor, and a liaison between the court and the central state administration. Embodying both functions, the procuracy was intimately linked with the Ministry of Justice. Administratively, the minister of justice, who also served as the Procurator General, remained at the head of the procuracy and in charge of the Chief Procurator's Office of the Senate, as well as the procurators of the lower judicial chambers. Higher ranking procurators had the right to give their subordinates binding instructions, and the tsar made all appointments on the recommendation of the minister of justice.<sup>37</sup> In keeping with this new prosecutorial role, the post now entailed educational requirements and some years experience in the courts, though Ministers of Justice skirted these when necessary. With the abolition of its diffuse and general supervisory function, the procuracy became primarily a prosecutorial body. In the post-reform period it was this activity that the public and legal profession identified with the procuracy.



The procurator's authority was greatest in the criminal sphere, where he was a key figure at all stages of the criminal process. Criminal cases were almost always cases in which the state was one of two parties to a suit (cases in which private citizens acted as plaintiffs were extremely rare). The procurator received information about a crime and instituted an investigation, enlisting the legwork of judicial investigators and police who were under his direct control, the latter in a more circumscribed fashion.<sup>38</sup> Within the criminal process, it was incontrovertibly the preliminary investigation where the procurator wielded the most power, combining both supervisory and prosecutorial functions. On the basis of the report given to him by the court investigator, he drew up and presented the Act of Indictment, or terminated the proceedings for lack of evidence. If the appropriate Indictment Bench approved the Act of Indictment, the state's procurator proceeded to prepare his case against the accused, conducting further investigation and questioning witnesses and experts. As supervisor he was personally responsible for assuring that all phases of criminal prosecution were conducted according to proper procedure. At the trial phase, the procurator conducted the prosecution in accordance with adversarial procedure;<sup>39</sup> he examined and cross-examined witnesses, marshaled evidence, called in experts to testify for the prosecution, and finally, addressed his concluding remarks to the judges or jury. The procurator also determined on which statutes to try the defendant.<sup>40</sup>

By virtue of this 1864 reorganization, the procuracy became a critical link in the state apparatus for preserving social order. On the workday level, this meant defending the state's interest by securing a high rate of convictions, notwithstanding the language of the reformed procedural codes which instructed both the defense and prosecution to represent justice and seek truth above all.<sup>41</sup> When the revolutionary movement gained force in the second half of the nineteenth century, the procuracy was already institutionally situated to play an active part in defending that state against political crimes. The procuracy's involvement in the investigation and prosecution of political crimes, and excesses therein,

contributed to the increasing polarization of the parties and divergence of public opinion toward this segment of the legal profession.

Contributing to this polarization were the related processes of state intervention and self-selection among legal graduates. While the Ministry of Justice generally supported the reformed courts and their activity, historians have demonstrated that Ministers of Justice were under tremendous pressure, especially in the 1880s, to reduce the autonomy of the reformed courts.<sup>42</sup> However, this practice was not limited to the period of so-called "counter-reforms." From the onset of the reforms Ministers of Justice exerted their influence over the composition and activity of the procuracy in a variety of forms.<sup>43</sup> Under Count Pahlen, Minister of Justice from 1867 to 1878, the ministry began to utilize its control over entry and advancement in state legal occupations to recruit and promote candidates who were more attuned to the "state's interest." The value the state placed on the prosecutorial activities of the procuracy, in conjunction with the procuracy's direct administrative linkage to the Ministry of Justice, made members of this occupational group particularly susceptible to state intervention. These factors altered the objectives of and attitudes within the procuracy. No longer an appropriate outlet for the liberal sentiments of legal graduates, the procuracy underwent a "purging" from the outside and within. Those committed to the legal culture of the *pravovedy* increasingly turned to the bar, while those desiring personal career security and rapid advancement in the state legal bureaucracy chose state service.<sup>44</sup> All of these factors contributed to what Levin-Stankevich describes as the further separation of "the procuracy and its purposes from the judiciary and from the liberal spirit of the Court Statutes."<sup>45</sup> For these reasons, following the judicial reform the reformed procuracy and its fief not only became a counterweight to the defense bar, but importantly, it remained as it began, a defender of the interests of the autocracy, "the eye of the sovereign."<sup>46</sup>

If the procuracy was the eye of the sovereign, the judicial investigator was the arm of the procuracy. The reform statutes instituted this procedural relationship, which made the investigator responsible both for carrying out the demands of the procurator or his

assistant, and recording which measures he took in this regard.<sup>47</sup> Unlike the office of the procuracy that predated the judicial reforms by more than a century, the post of judicial investigator was introduced only on their eve, created in 1860 as part of the reform of criminal investigating procedures.<sup>48</sup> With the consolidation of these changes in the 1864 statutes, the judicial investigator came to play a major role in reformed criminal procedure, particularly the pre-trial investigation. Yet despite the position's seemingly auspicious origins, the investigator in large part simply replaced the police in handling the investigation, and was formally and informally at the mercy of the procurators under whom he worked. The Statute on the Courts contributed to the investigator's dependence on procurators. Under Article 213, investigators were appointed on recommendations from the circuit courts; the recommendation of a procurator from the court was often enough to shift an investigator to a different court.<sup>49</sup>

As executor of the pre-trial inquiry, the judicial investigator was in many ways a repository of residual state prerogatives. The very structure of the investigation gave the state, in the form of the prosecution party, an unequal advantage. While the ideals of the reformed criminal procedure included the presumption of innocence, the entire investigation was biased towards the authorities who accused the suspects. Russian defense lawyers—like their French counterparts until 1896—faced extreme restrictions on their role in the investigation.<sup>50</sup> Within this already imbalanced investigatory context, in which only the state's interests were represented, the investigator's vast responsibilities included questioning witnesses, preparation of depositions and other investigatory documents, collection of physical evidence, and marshalling of all medical and other relevant types of expertise. The information which the investigator gathered via these duties formed the basis for the state's bill of indictment (*obvinitel'nyi akt*), which was effectively the starting point of the trial phase. At the trial session, during which the investigator also possessed official "member" status, the defense lawyer's task was to challenge and overcome the state's indictment.<sup>51</sup> As the procurator's implement, and invested with sig-

nificant authority of his own to shape the investigation and hence outcome of the case, the investigator was in many ways the most visible symbol of state prerogatives.

Among judicial personnel, and in accordance with procedural dictates, the physician-expert interacted most intensively and directly with the investigator; this relationship, in turn, was the most contentious of all the physician's procedural interactions. Indeed the reform statutes afforded investigators much discretionary power over the medical aspects of the investigation. The investigator decided which experts to call in, how many to use, where the physician was to conduct the medical investigation, which questions the physician was to investigate, and whether the physicians' conclusions raised doubt and warranted review by higher authorities. This almost unlimited scope of power was not unique to Russian investigators. In France, as laid out in the 1808 *Code d'instruction criminelle* (which was only slightly modified in the course of the century) the key figure in the judicial process was the *juge d'instruction*, or investigating magistrate.<sup>52</sup> According to historian Ruth Harris, the of French investigating magistrate was "often portrayed as a redoubtable figure, the resurrected version of the royal magistrate under the *ancien régime*, mandated to prepare a case against the defendant which his superiors would use in the prosecution."<sup>53</sup> Nevertheless, gauging by the historical accounts of the foremost students of French forensic medical activity, as well as the writings of contemporary Continental medical experts, this procedural pecking order was not an issue for European physicians, and certainly not the lightening rod for debates over the expansion of medical experts' authority, professional rights, and evidentiary status, as it was in Russia.<sup>54</sup>

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PRELIMINARY INVESTIGATION

As in other Continental legal systems based on Roman-canonical procedure, the investigator was responsible for establishing the fact that a crime had been committed. As I have discussed in Chapter 1, the doctrine of proof in inquisitorial procedure stipulated that the *corpus delicti* (the facts which constitute an offense) had to be proven as rigorously as the perpetrator's guilt.<sup>55</sup> It was this basic tenet of Roman-canonical theory which tended to "valorize" medical expertise in particular by making it a compulsory element in the formalized system of proof; where medical assessment was potentially useful, it tended to be mandatory. This contrasted with the English system's principle of subjective persuasion, which did not require any specified standards or evidence, medical or otherwise, with respect to either crime or guilt.<sup>56</sup> In Russia, as on the Continent, when the investigator deemed special types of knowledge necessary to establish the fact of the crime, he was required to call in the appropriate type of expert.<sup>57</sup> Medical expertise was included in the investigatory stew under this theoretical-procedural rubric, carried over from pre-reform inquisitorial procedure. Remaining the theoretical underpinning of the post-reform preliminary investigation, the investigator's establishment of the *corpus delicti* was still a prerequisite for indictment under the new judicial statutes.

The key distinction after the reforms was that all evidence that the investigator gathered to prove that a crime was committed would be tested orally in courts, and evaluated by the jury as one of three questions that constituted guilt in Russia.<sup>58</sup> Under pre-reform inquisitorial procedure, as we have seen, the court evaluated and weighed evidence according to a rigid and formalistic set of rules. By contrast, the new approach to judgment would embody an active, deliberative, independent, and more subjective means of evaluation "according to conscience" (*po sovesti*).

Within this theoretical-procedural framework, Russian law defined those circumstances that necessitated medical expertise. The interpretation of these circumstances, in turn, was left to the judi-

cial investigator. Specifically, the investigator was legally obligated to call in a forensic physician in the following cases: when medical knowledge or experience was necessary to determine the fact of the crime (*corpus delicti*); and/or to determine whether the accused had the mental capacity to be responsible for his actions (*vmeneno v vinu*).

Where did medical expertise fit in the new procedural statutes? As it appeared in Russian law, mirroring Continental codes, medical investigations were a subgroup subsumed under the investigator's rules for inspection and examination (*osmotr* and *osvidetel'stvovanie*). The organization of Russian procedural statutes, arranged like nesting dolls, moved from the broadest rubric (the investigator's activity) to the most specific (medical investigations), with each category subsumed by the one just beneath it. First one finds the rules for the investigator's inspection,<sup>59</sup> followed by guidelines for the investigator's invitation of experts, broadly termed "knowledgeable people" (*svedushchie liudi*).<sup>60</sup> After this all-encompassing category were directions pertaining specifically to investigations via physicians (*cherez vrachei*),<sup>61</sup> followed by articles devoted to specialized subgroups of medical expertise, which included the examination of women and the investigation of the defendant's mental condition.<sup>62</sup> In practical terms, the investigator oversaw all types of investigatory activity—specialized or otherwise. Even in those cases involving medical experts, the investigator was required to conduct his own preliminary external examination of the medical subject, compile his own protocol about it, and supervise the physician's work.<sup>63</sup>

The language of these procedural statutes, while criticized alternately for being vague and archaic, was nevertheless accorded great significance by the critics. No unit of language was too small for scrutiny and debate; in the case at hand, the Russian word *cherez* (via)—which linguistically linked the investigator and the physician—was a wellspring of post-reform controversy over the relative autonomy of forensic-physicians vis-à-vis the investigator, and more broadly, polemics over the appropriate parameters of professional expertise in the administration of justice. As one

example, a professor of law at Kharkov University, L.E. Vladimirov, challenged the seemingly obvious meaning of the statute: “While in our Statutes of Criminal Procedure one finds the phrase ‘[investigators] examine and attest via [*cherez*] physicians,’ this phrase, however, in no way designates that the medical investigation is to be conducted by the investigator via the physician.”<sup>64</sup> Rather than finicky bickering, critics’ close attention to the language of the law was a means of addressing and redrawing the bounds of occupational authority and autonomy within the network of state officials.

To be sure, the structure of the statutes, in accordance with the dictates of inquisitorial procedure, contributed to activists’ focus on the statutes. Medical expertise was statutorily situated as one component of the investigation as a whole; yet it was also cordoned off under its own rubric, with its own particular set of procedural rules. The ambiguity of this statutory arrangement—separate yet subsumed—engendered both practical confusion and polemics over the appropriate intellectual-professional boundaries between the medical expert and the state’s investigator. These debates took place in specialized legal and medical periodicals, at professional association meetings, and in the governmental publications of the Ministry of Justice and the Medical Department. Before turning to these debates in the following chapter, it is necessary to first examine the procedural rules specific to medical expertise.

The law outlined the situations that required the participation of forensic physicians. While the investigator could decide how many experts to invite, he was legally obliged to invite at least one forensic physician in those circumstances when the body and/or health of the aggrieved or accused was germane to the investigation—both in terms of establishing that a crime was committed, and the question of criminal responsibility.<sup>65</sup> As defined in statute, those circumstances included “dissections, different types of injuries, traces of rape, and the condition of the health of the aggrieved or the accused.”<sup>66</sup> Unlike the Statute of Forensic Medicine (1842), the reform statutes restricted the official purposes for employing forensic physicians to assistance in the investigation

of crime or criminals. With the replacement of the police by the investigator in criminal procedure, and in conjunction with the comparative “de-administrization” of judicial proceedings, the judicial investigator alone (rather than the police) was responsible for enlisting physicians into the judicial process. Yet in spite of these changes, the line between the physician’s forensic and administrative/police functions remained fuzzy.

Notwithstanding the efforts described above, police were not entirely excluded as participants, for reasons statutory and customary. As granted by the statutes on criminal procedure,<sup>67</sup> the police could replace the investigator in “necessary circumstances.”<sup>68</sup> Barring these exceptional cases, the police no longer had the right to independently conduct searches, confiscations, examinations, and consequently, did not have the right to designate autopsy.<sup>69</sup> “Meanwhile,” as one physician asserted in 1867, “the police designate them, and will continue to designate them as long as those grounds currently listed in the Statute of Forensic Medicine continue to exist.”<sup>70</sup> Indeed, physicians continued to serve the police, who called upon them to assist with routine and frequent administrative duties such as determining the cause of all untimely deaths prior to official permission for a burial.<sup>71</sup>

The autopsy was the oldest and remained the most common of all forensic medical activities.<sup>72</sup> However the dual bodies of forensic-medical legislation conflicted on what circumstances required forensic autopsies to be performed. As we discussed above, the Statute of Forensic Medicine listed a vast number of grounds for autopsy, many unrelated to criminal investigations.<sup>73</sup> In accordance with the 1864 judicial decrees forensic medical investigations were to be conducted *only* in relation to crime and/or the criminal. Thus, according to the new statutes, sudden death (*skoropostizhnaiia smert'*) and so-called accidental death positively could not be the subject of forensic medical investigation. Meanwhile, the Statute of Forensic Medicine, which listed autopsies as obligatory, remained active.<sup>74</sup> Thus, one medical commentator observed, the introduction of the new criminal procedure spawned a dual type of autopsy: “one series of autopsies designated by the investigator,



and the other, 'administrative-police' [autopsies], designated by the police in accordance with the statutes of the Statute of Forensic Medicine, strictly for the determination of the physiological type of death."<sup>75</sup> After the reforms, the police continued to summon forensic (city and district) physicians for what had previously been routine administrative reasons. This confusion over the forensic-medical autopsy clearly illustrates the incomplete break of forensic medicine with police-administrative functions after the reform. As one physician observed in 1867, old habits were hard to break; "[w]hat began originally as the police following the letter of the law, turned into habit, routine, and in this way, little by little it became impossible [for the police] to regard dissections otherwise."<sup>76</sup> In other words, though the reform intended to separate judicial and administrative functions, the physician's forensic role embodied the intransigence of old occupational practices and connections.

The mandatory gaggle of official witnesses who attended the medical examination confirmed the extent to which the physician's forensic work was ensconced in a broader social network. In the company of state officials, local notables, *babki* (village midwives), and judicial actors, the scene at the physician's dissection or medical examination could, in fact, be crowded. First, the investigator could invite more than one physician to examine the corpse, not excluding the physician who treated the deceased, if the investigator deemed necessary an explanation of the course of an illness and its treatment preceding the death.<sup>77</sup> As with all other forensic-medical activities, the physician conducted the autopsy under the investigator's direct instruction and supervision.<sup>78</sup> This practice was another extension of pre-reform procedure, which obligated the police to supervise all forensic medical work; now it was the investigator who was required to be present to ensure that the forensic physician strictly observed the procedural form prescribed by the law.<sup>79</sup> Also legally required to attend the medical examination were official witnesses (*poniatye*), that is, local elders or men of high social rank who attested to all that was said and done during the forensic medical examination.<sup>80</sup> Finally, all participants in the

case were permitted to attend the medical examination, though the investigator was not obliged to delay the examination for their arrival.<sup>81</sup> The law granted exception to these attendance requirements only under those circumstances when the presence of one of the aforementioned individuals would in some way “hinder” the forensic examination.<sup>82</sup> When it came to listing what those exceptions might be, however, the procedural code cited only those cases which involved “the exposure of the concealed parts” of a woman’s body; in such cases, the investigator was not to attend if the female examinee so requested, and in his stead “married women” served as the official witnesses.<sup>83</sup> For his part, the physician was accountable to all present. The examining physician was obliged to inform the investigator and witnesses not only “about all that was discovered during the course of the inspection, but also to clarify, to the extent possible, the significance of each physical manifestation and answer all questions posed to him.”<sup>84</sup>

The physical setting of such events varied as widely as their social composition. While conditions differed significantly between university cities and the provinces, forensic medical practitioners of all stripes bemoaned the same deplorable working conditions, which saturated the pages of the general medical press throughout the nineteenth century. Shortly after the enactment of the judicial reforms, one commentator criticized the unfortunate circumstances under which physicians were forced to conduct their forensic autopsies:

First, if in almost all of the provincial cities they are conducted in police fire sheds, then what is there to say of villages? In winter, the corpse is dissected in a cramped and dark shanty of some sort; in the summer, dissections are performed under the open sky, and sometimes simply out in the field, without any possibility of any kind of convenience, even the most necessary. Second, dissections are conducted with instruments long since obsolete. One can imagine, being in such a lamentable situation, that if one manages at all with [such instruments], it is more likely due to the ingenuity of the *fel’dshers*. . . .<sup>85</sup>

Other commentators complained that even in larger towns medical examinations often had to be conducted in the investigator's office.<sup>86</sup>

While the examination arenas were makeshift, the procedural guidelines surrounding it were steadfast. During the medical examination, both the physician and the investigator were obliged to compile their own protocol about the events as they took place.<sup>87</sup> In this report, the physician was to provide a detailed and thorough exposition of the substance and results of his examination; the protocol had to be signed not only by the physician, but also the investigator and others in attendance.<sup>88</sup> This protocol then served as the basis for the physician's more formalized final report, the *akt osmotra*, which the physician was to compile "at home" and when he was "not rushed." The investigator was likewise required to compile a protocol about the physician's autopsy or medical examination, including in it everything that occurred in his presence: that which was seen; by whom it was seen; when and where the examination and attestation took place; who was present in the capacity of the parties, official witnesses of the investigation, and experts; all that the physician discovered via the examination; all comments and objections of the participants or official witnesses; the answers which the examining physicians offered; and finally—just in case anything was left out, the investigator was to include in his protocol "the entire course of the examination in the consecutive order in which the physician conducted it."<sup>89</sup>

While it is often the case that a variety of participant-observers entail an equal variety of opinions over the "facts" observed, procedural regulations sought to minimize divergent accounts in the trial dossier. This included the opinion of the medical-expert. The content of the forensic-medical statutes demonstrate how procedure was structured in a way that ensured the subordination of the medical expert and his findings to the direction of the police and after the reforms, the investigator. Collaboration of some sort between the physician and investigator was necessary, as the law required concordance between the facts included in their respective protocols. With the aim of eliminating conflicts between the two protocols, the Statute of Forensic Medicine required that the

physician and investigator (or prior to the reforms, the police) consult with each other after the examination took place and square their reports. This consort was to take place after the physician had “read through [his protocol] carefully and compared [it] with that of the police”; if it turned out that “something was forgotten or left out,” the physician was to “quickly add it, and in this way prevent the possibility of a contradiction between the protocols....”<sup>90</sup> Only after the investigator and physician had aligned their facts, were the others present allowed, and indeed required, to sign the protocols.

Besides having control over the documented account of the medical examination, the investigator more actively shaped its course. Most directly and hence controversially, the investigator decided which medical questions the physician was to investigate.<sup>91</sup> The investigator presented formal questions, written or oral, to the forensic physician. The latter was obliged to organize his investigation around those prescribed questions, and answer them conclusively in his *akt osmotra*. Critics found this arrangement problematic in both principle and practice, and objected to the authority that this prerogative afforded investigators in the medical sphere of the case. As the following chapter will discuss, this and other aspects of the investigator’s procedural role served as a springboard for medical and legal practitioners’ post-reform arguments for expanding the rights and autonomy of medical experts in the legal process. Commentators from both occupational groups agreed that the investigator’s questions “often can be unhelpful, one-sided, and even worthless.”<sup>92</sup>

At the same time, as contemporary legal scholars often pointed out, the physician was not restricted, at least formally, by the investigator’s views and opinions, as expressed in his questions.<sup>93</sup> Indeed, the procedural statutes granted physicians the right to extend their investigation beyond the scope of the investigator’s questions, in the interest of the pursuit of truth.<sup>94</sup> In accordance with inquisitorial process, in Russia as on the Continent, the ascertainment of truth was the absolute goal of judicial proceedings.<sup>95</sup> In this way, the theoretical underpinnings of Roman-canonical proce-

dure, upon which 1864 procedure was based, corresponded neatly (as contemporaries' arguments demonstrate) with the rhetorical and methodological goals of scientific inquiry: the objective search for (natural) truth. This theoretical imperative offered critics another avenue and justification to argue for the expansion of physicians' privileges and rights, that is, in the unimpeachable name of proper, unfettered scientific investigation.<sup>96</sup> "Thus," as one legal scholar indicated, "it is understood that the expert, conducting his independent investigation can, according to the law, extend his investigation beyond the boundaries indicated by the court, if the investigation of the truth requires this."<sup>97</sup> Nevertheless, the practical reality remained: "Experience shows that many experts do not transcend the boundaries of those questions posed to them."<sup>98</sup> Over time, investigators' questions to experts became somewhat standardized; in the latter decades of the century, the state issued statutory guidelines and published lists of official forensic-medical questions.<sup>99</sup> Handbooks were another means for disseminating these formalized questions. For example, in his handbook, *Manual for the Study of Forensic Medicine, Written for Jurists*, Professor Shtol'ts devoted considerable attention to explaining the types of questions which jurists should present to the expert in each area of forensic medicine.<sup>100</sup>

Aside from shaping the physician's work via his questions, the investigator could also subject the physician's findings to the formal process of review. The resolution of conflicting expert testimony was not left for the jury to decide as in English trials, nor did the courts consult university medical faculties, as in the German system.<sup>101</sup> Instead, much of the discretion over the evaluation of the medical testimony rested with the investigator. In spite of his lack of medical training, the investigator had the legal authority and obligation to express his opinion or criticism of the medical investigation, when either the physician's actions or explanations seemed dubious to him.<sup>102</sup> Moreover, if the investigator did not believe the physician's findings to be correct, without having to provide any reasons he could demand the review (*poverka*) of other physicians. Alternatively, he could choose to request new

conclusions from the Medical Section of the Provincial Boards, and beyond that, the highest forensic-medical instance of review, the Medical Council of the Ministry of Internal Affairs.<sup>103</sup> The Senate revised this procedure in 1886, transferring full discretionary authority (over the method of review) from investigator to the local medical administration.<sup>104</sup>

After the reform, and in the context of the new criminal procedure, physicians were still obligated to conduct their forensic examinations according to the century-old rules stated in the Statute of Forensic Medicine.<sup>105</sup> In this regard, he was required to record in writing, either by himself or via an assistant, his own detailed protocol, in which he was to document the entire course of the investigation, to be signed by all individuals present during the investigation.<sup>106</sup> Before submitting his report to the investigator, however, the physician had to transcribe the less formal protocol, jotted down during the exam itself, into the more formalized document called the *akt osmotra* or *svidetel'stvo* (report of the examination or attestation)<sup>107</sup> for which he was given “no more than three days” to prepare—though the law did allow (and in fact recommended) that he prepare it in the comfort of his home.<sup>108</sup> In compiling this document, the physician was to follow the rules detailed in the Statute of Forensic Medicine.<sup>109</sup>

The method by which the physician was to complete his formal documents was as highly formalized as its prescribed content. The Medical Council in 1852 issued the official form forensic-medical documents were to take for the remainder of the imperial period.<sup>110</sup> While the myriad regulations surrounding the physician's completion of the *akt* were particular to Russia, the general structure of the report was comparable to forensic-medical documents in European countries.<sup>111</sup> The Russian *akt* was comprised of four sections: the introduction, historical section, opinion, and conclusion.<sup>112</sup> In these sections, the physician was to present in a highly specified manner all information gleaned by the medical examination.

The Statute of Forensic Medicine explicated the nuts and bolts of all aspects surrounding the compilation of the physician's *akt osmotra*, as well as the actual content of its four parts.<sup>113</sup> The fol-

lowing is a brief description of those sections. In the "introduction," the physician was to state the formal reasons for the medical examination.<sup>114</sup> The "historical" section was a detailed description of the entire examination and different sources of information (the physician was to distinguish that which was discovered via examination from that discovered via extraneous sources).<sup>115</sup> The "opinion" was to be based on that discovered during the dissection or examination, "in agreement with the rules of science."<sup>116</sup> Moreover, the physician was to distinguish that about which he was certain, from that which remained inconclusive or only probable.<sup>117</sup> Finally, the "conclusion" was more ceremony than substance, and reflected the physician's dual accountability to medical ethics and to the state. It was to contain "the confirmation that the entire examination was conducted according to the very essence of fairness and honor, in agreement with the rules of medicine and according to the obligation of service and oath." The ceremonial and the bureaucratic were blurred in concluding formalities which included the physician's signature, indication of his rank (*chin*), and the official stamp of the judicial chamber where the physician presented his *akt osmotra*.<sup>118</sup>

Built into the judicial-bureaucratic matrix by statute, the physician's report had official status and became an essential part of the trial dossier. After the physician completed his *akt*, it was shuttled up the chain of command. In short, the physician signed and presented the document to the investigator, who appended it to his own protocol, which he had compiled about the medical examination.<sup>119</sup> The investigator included this appended protocol with the rest of the investigatory dossier, and passed it along to the procurator. The procurator, in turn, based the state's indictment on it.

## THE TRIAL

Physicians also were obliged to participate in the second stage of judicial proceedings, the court session. A year and a half after the adoption of the judicial statutes, the jury court began to function on 17 April 1866 in St. Petersburg and on 23 April of the same year

in Moscow. Public interest in the open proceedings was not small; the new courtrooms were packed.<sup>120</sup> Following the capital cities, installation of trial by jury expanded gradually throughout the empire. By the mid-1880s, three-quarters of the population of the empire, and ninety percent of its European population were being served by the new system in over sixty circuit courts.<sup>121</sup> With regard to caseload in the new court hierarchy, jury trials comprised an increasingly large portion of the judicial pie; indeed, jurors in Russia took part in considerably more criminal trials than other major European countries.<sup>122</sup> Jury trials, whose volume expanded continuously throughout the reform era, eventually constituted close to five percent of all cases handled in the empire's courts by the early twentieth century.<sup>123</sup> Relative to the total number of cases at the upper level of the court system (beginning with the circuit courts), these figures are even more striking: jury trials represented approximately seventy percent of all cases processed, and by the early 1870s roughly seventy-five percent of all defendants were tried by juries.<sup>124</sup>

While the general idea of the jury was borrowed from the West, the Russian jury was not a direct copy of either the French or the English models.<sup>125</sup> The standard jury in Russia was a twelve-member panel chosen by lot from an initial list of candidates. The procurator and defense attorney possessed specified rights of scrutiny and rejection with respect to the primary list.<sup>126</sup> Although the Russian legal code strongly recommended the achievement of unanimity, only a simple majority was required for a verdict from the jury.<sup>127</sup> The new judicial statutes provided for a retrial if the three judges agreed that the original jury had convicted an innocent person (similar to German practice). It should be noted that the decisions of the jury were not subject to appeal to a higher court on the basis of a claim that the jury had made an incorrect decision. On the other hand, both the prosecution and the defense had the right to appeal to the Criminal Cassation Department of the Senate, claiming the court made procedural mistakes, in the hopes of having a mistrial declared.<sup>128</sup>

Physicians testified before juries most often in the newly instituted circuit courts. The pre-reform system of class courts under



the control of governors was replaced by a new hierarchy of courts open to all citizens, including the former serfs.<sup>129</sup> The circuit court was designated as the first judicial instance in the hierarchy at which a trial by jury could occur.<sup>130</sup> The circuit court had within its jurisdiction all criminal cases excepting especially serious ones of a political, “state,” or “official” (*dolzhnostnye*) nature.<sup>131</sup> These more sensitive cases generally were allocated to one of the two higher instances, the judicial chambers and the Senate. The judicial chambers could officially try cases before a standard jury (particularly if they concerned official or civil service crimes), but generally “courts of class representatives” (*sudy soslovnykh predstavitelei*) would render the verdict. These “special” juries were essentially dominated by individuals from higher estates, and would therefore prove theoretically suitable for the adjudication of cases to which the regime was sensitive.<sup>132</sup> The Senate functioned primarily as the new judiciary’s Cassation Department and its highest court of appeals. As with the judicial chambers, when the defendant’s alleged crime fell under the category of official service crimes, the Senate could and occasionally did adjudicate cases before a jury.<sup>133</sup>

The post-reform court session differed from its earlier incarnation not only in its system of adjudication by jury, but in its adversarial procedure.<sup>134</sup> The court’s review of a case was no longer a strictly *in camera* affair. Trials became contests between the parties, open, public, with oral testimony, and representation by lawyers. However, historian Girish Bhat has argued that even during an era of Westernizing judicial reform, adversarialism (*sostizatel’nost’*) put down roots in only a limited fashion. He attributes this to the basic attitudes and strength of the state’s “prosecutorial arm.” Moreover, to the degree that adversarialism in criminal procedure did develop, it did so in its own particular style. In his analysis of the particular characteristics of Russian trial by jury, Bhat argues that trial by jury in the early reform period reflected a distinctively Russian version of criminal justice, “one in which adversarial adjudication evolved into a consensual mode of decision making in the courtroom.”<sup>135</sup> Examining the statutory language, he points to an underlying emphasis on the examination of all potentially relevant issues, and not simply those aspects of the case

deemed essential by the two opposing counsel.<sup>136</sup> Indeed, the statutes directed procurators and defense attorneys to seek truth rather than victory at any cost. However, notwithstanding the non-combative statutory rhetoric, legal historian Kazantsev points out that after the euphoria of the first post-reform years had passed and the swamp of routine set in, “prosecutors prosecuted and defenders defended.”<sup>137</sup>

The key distinction after the reforms was that all evidence which the investigator gathered for the state would be tested orally in courts, and evaluated by the jury as one of three questions that constituted guilt in Russia.<sup>138</sup> The explicit objective of the trial was the attainment of justice (*spravedlivost'*) through the ascertainment of the truth (*istina*). According to both contemporaries and statute, the court investigation served a dual purpose: the checking of all evidence collected during the preliminary investigation and the independent investigation of the truth.<sup>139</sup>

The expert's role at the court session corresponded with this two-fold goal.<sup>140</sup> Experts who participated in the preliminary investigation, like other witnesses, were officially obligated to testify at the court investigation by strength of the same subpoena that summoned them to the pre-trial investigation.<sup>141</sup> At the court session, the expert was obliged to again, and conclusively, state his opinion and defend it if it was refuted. However, this was only one of several possible activities of the expert at court. During the “court investigation” (*sudebnoe sledstvie*) the following could occur: the checking or review of the medical *akt*, the court could call in the original experts (as well as investigators) to the court session to give a thorough account of their investigation or testing,<sup>142</sup> and the conduct of a new examination or testing via new experts chosen by the court or designated by the parties.<sup>143</sup> The first two activities were mandatory. Indeed, this aspect of the physician's role—the obligatory, detailed recitation of the forensic-medical *akt*—became so ubiquitous at trials that it was parodied in contemporary fiction.<sup>144</sup>

Under the new procedural rules, the court and the defense had greater discretion over the choice of experts at the trial stage than during the preliminary inquiry. The court could call for a new exam-

ination upon its own initiative or that of jury members or the parties. What is significant here is that the experts for this task could be chosen either by the court or the parties, rather than the investigator.<sup>145</sup> This new examination was to be conducted at the court session itself, in front of the jury rather than under the investigator's supervision. If that was not possible, the expert was to report on his examination at the court session. Three years after the enactment of the reform, the Cassation Department further expanded the latitude of the courts under this statute, ruling that the court was not restricted in the number of new experts it invited, nor in the time it granted for the conduct of the new examination.<sup>146</sup>

Experts were subject to questioning and "cross-examination" just as witnesses under the adversarial procedure. After the experts presented their conclusions, and upon permission of the presiding judge, they could be presented with questions by the judges, jury members, and/or the parties.<sup>147</sup> If more than one physician contributed to the *akt*, the expert chosen to orally present the jointly-reached conclusion was the one subject to the questioning.

Subsequent Senate rulings indicate that there was some confusion regarding the content and purpose of this questioning. In the decades following the reform, Cassation decisions indicated certain types of questions as off-limits in the interrogation of experts. First, questions which extended beyond the boundaries of the given case; for example, in questions about the cause of the death of an individual determined to have been killed, it was not admissible to request from the expert an explanation as to whether or not an illness existed which would have entailed such changes in the body as those found during the examination. Second, questions which were not directly related to the case, even though they had some connection to it; for example, whether an expert agreed with a given theory, views, or conclusions of well-known scientific authorities. Third, questions about the capacity of the expert's opinion to be used as evidence (*dokazannost'*). Fourth, questions which did not relate to the subject matter or explanation for which the expert was called to court. In the opinion of a Kharkov legal professor, these Cassation decisions reflected the official view that neither the parties nor the judge were competent to evaluate the

motives and decisions of physicians; rather, their questions should concern mainly the physicians' methods of research, from which the judge and/or parties could draw their own conclusions about the experts' results.<sup>148</sup>

By virtue of their role as intermediary between experts and other trial participants, the judge interacted more directly with the expert than did other court officials. Who were the judges who moderated all of the expert's activity during the trial? While the form of the court's judiciary panel did not change dramatically after the reforms, its social content did. Both before and after the judicial reform, the "court" (*sud*) literally referred to a collegial decision-making body.<sup>149</sup> Prior to the reforms, the court consisted of a presiding judge (or chairman, *predsedatel'*) and various judicial "assessors" or other types of legal officials; most of these court officials were elected by nobility and privileged townspeople. After the 1864 statutes, the post of chairman remained, accompanied by a minimum of two additional "members" (*chleny*), who together comprised the official court.<sup>150</sup> While the chairman presided over the proceedings, and alone managed the order of testimony and the questioning of witnesses, the court in full discussed and formulated the list of questions posed to the jury.<sup>151</sup> In contrast to the posts of investigators and procurators, the reform statutes allowed flexible minimum credentials for joining the court, except in the case of the chairmen, for whom these credentials were more rigorous. Legal experience was required at some level of the civil service or judiciary, but the statutory criteria frequently permitted non-jurists to serve as members.<sup>152</sup> This pluralistic aspect was one of several key ways in which the judiciary contrasted with the ranks of procurators and investigators.

Judiciary independence was among the reform's most radical transformations with regard to court personnel.<sup>153</sup> Unlike procurators who were in a vulnerable position as direct subordinates of the Ministry of Justice and could be promoted, demoted, or transferred, judges were unique for the relative autonomy that they enjoyed after the reforms. By contrast, as Peter Solomon describes, the vulnerability of pre-reform judges equaled that of most

post-reform court officials. Before the 1864 reform, judges were often local notables and, like the courts themselves, were not independent of political authority.<sup>154</sup> In this particular regard, the reform served as a distinct break. The new statutes granted life tenure (i.e., irremovability, *nesmeniaemost'*) to judges in the higher levels (the circuit courts and the judicial chambers).<sup>155</sup> With regard to their work, judges gained unprecedented discretion in applying the law, including an obligation to rely in part upon their conscience, and, at least in the higher courts, the right to interpret the law.

While the law defined the basic procedural outline of the expert's role and interactions with other officials at court, it was the gaps between the rules, about which the law was silent, that generated controversy among critics. Physicians and jurists argued that in the absence of such legal guarantee, physicians' requests, for example, to remain in the courtroom to hear other testimony or to question witnesses, were often denied. These procedural rights and the types of information they made available to experts, the arguments went, were critical to the physicians' scientific endeavor and "objective" pursuit of the truth. "The rights of the expert during the court investigation are absolutely not defined by law ... they were, however, clarified to a certain extent by the Cassation Department of the Senate," observed one Kharkov professor of forensic medicine.<sup>156</sup>

Connected to the question of experts' rights was the equally contested and legislatively ambiguous question of status. The judicial statutes did not clearly define the procedural status of the expert. And while the Russian expert's procedural role shared several similarities with that of colleagues abroad, the composite status that emerged from Russian statutes followed neither the French nor English model. The medical expert in France had a fixed institutional role and status, dating back to medieval European statute.<sup>157</sup> In the French system, the sworn surgeons (*chirurgien juré*) and sworn physician (*médecin juré*) possessed exclusive rights to criminal medico-legal work. The *jurés* were not considered mere witnesses, as in England; their status resembled

that of a subordinate judge. French *jurés* submitted their reports separately from those of the magistrates who accompanied them to the scenes of death, and the reports were kept secret. Medical reports could be questioned only by the judge or, at his instigation, another medical expert. Moreover, French medical experts were reasonably well paid for their medico-legal work.

By contrast, English medical witnesses were recruited casually, and had no equivalent institutional role. When a magistrate wanted information on the condition of a wounded person, it was usually provided by whatever surgeon happened to be attending the patient; a *post-mortem* examination could be conducted by any surgeon whom the coroner chose to consult, and in practice it was often the practitioner who treated the deceased person during his lifetime. English medical witnesses also lacked the special legal status of French *jurés*. They testified at inquests and trials on essentially the same terms as other witnesses. Whereas Continental experts submitted written reports on which they normally could be questioned only by a judge, English medical witnesses had to present their observations and opinions orally, in the presence of the parties and other witnesses. They could be challenged with little formality and by any participant at an inquest or trial. In addition, the English expert did not have the financial benefits associated with Continental medico-legal work.<sup>158</sup> In sum, the status of French and English experts derived directly from their respective procedural settings.

The medical expert in post-reform Russia was an amalgam of both of these models; like the reform itself (the new judicial institutions and procedures), which the framers borrowed from the French variant of the English system, the physician's role was likewise the product of selective borrowing.<sup>159</sup> Without a clearly defined role vis-à-vis other judicial actors and types of evidence, the status of the Russian expert at court was, by default, a composite of different statutory elements: part witness, part judge, and part state functionary. In some respects, experts were subject to the same procedural rules at court as were witnesses. For example, before giving their oral testimony, the new statutes required experts to take an oath according to the same process as witness-

es.<sup>160</sup> And like witnesses, experts could be challenged by the parties on the grounds that they lacked the qualities which the law required of them (as defined in Article 326).<sup>161</sup> The issue of payment was another grey area. While paid officials of the court like their Continental counterparts, Russian experts received remuneration that was, by all accounts, measly. In this respect the Russians were like English medical witnesses, receiving fees that were hardly an incentive to participate in forensic activities. The mixed signals continued. In terms of procedure, the payment of experts was comparable to other witnesses;<sup>162</sup> in terms of substance (their pay scale), it was comparable to bureaucrats (*chinovniki*) who traveled for official purposes.<sup>163</sup> Adding insult to injury, if the physician did not present his request for payment prior to the announcement of the verdict, he forfeited his payment.<sup>164</sup>

## CONCLUSION

The criminal procedure which guided physicians' forensic work after the judicial reform of 1864 was characterized as much by continuity with the pre-reform system as it was by novel institutions and principles.

From critics' perspective, the physician's role during the inherited pre-trial investigation was as, if not more pressing than that of the court session. On the one hand, the activities conducted during the investigation shaped the terms of the state's indictment, and in turn, the course of the trial. On the other hand, the essence of the physician's work was conducted at this stage alone: the medical examination itself; the physician's preliminary questioning of the defendant and/or witnesses; the transcription of notes jotted down during the examination into official, stylized conclusions; and the compilation of his official report (*akt osmotra* or *svidetel'stvo*) which the state's prosecutorial agent, the procurator, considered when drawing up the indictment. The practical purpose of the court session was merely to check, clarify, or supple-

ment the information gathered during the investigation. While the law obligated the original experts who participated in the investigation to present their written conclusions orally at the court session, the trial could not serve as a substitute arena for any of their obligatory pre-trial functions. For these, and the more obvious professional motivation that an expert's public (an often, highly publicized) court appearance was only as solid as his pre-trial work, the polemics over the expert's procedural status often began with this first, contentious stage.

Critics extended their basic arguments for the expansion of experts' rights to the trial session, despite the significantly different procedural dynamics of the court setting. In the context of adversarialism rather than inquisitorial procedure, and under the supervision of an independent judiciary rather than the state's procurator and investigator, the question of the physician's autonomy was raised less frequently. Instead, debate crystallized around those issues particular to the trial context, such as the appropriate criteria for evaluating medical testimony, and its weight and influence in adjudication.

Of the several innovations of the reform, trial by jury had the most direct implications for the changing status of medical expertise. For the first time in Russia's history, a jury of laymen were to decide verdicts according to their "internal conviction" rather than the rigid and formalistic rules of evidence that operated under pre-reform inquisitorial procedure. The implications for the status of the medical expert were provocative and two-fold. First, with the introduction of trial by jury, both in theory and practice, the authority which the public accorded medical knowledge and the medical expert was, at least potentially, the operative factor in the outcome of trials. Hence, forensic medicine constituted a competing source of authority to the autocracy in the immediate and localized sense, as a safeguard of due process and individual rights. The second implication of the new procedural context was that the significance of medical expertise became, in the opinion of legal and medical communities, even less defined than before. The combination of these factors led to a veritable storm of debate beginning in the wake of the reform's implementation.



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As the following chapter examines, legal and medical commentators went further than the authors of the 1864 judicial reforms and insisted that medical expertise was methodologically and ideologically distinct, and that this distinction should be reflected in the physician's procedural status and influence in legal decision-making. With adjudication now in the hands of the jury—a polarizing institution that reformers embraced as a form of political participation—the question of expert authority became incorporated into social and political debates in the decades following the reform.<sup>165</sup> The issue also spawned a hefty body of polemical literature in conjunction with arguments for securing and expanding the physicians' authority in the reformed judicial system. It is to these debates that we now turn.



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## CHAPTER 5

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### Reform and the Role of Medical Expertise

The standard periodization of the late imperial period is divided into “reform” and “counter-reform.” Historians have typically examined the 1864 judicial reform in accordance with this periodization. But this division is something of an oversimplification.<sup>1</sup> To be sure, the introduction of the judicial reform was met with glowing optimism to the point of hyperbole in the contemporary Russian press, where it was deemed “the most capable of changing in a radical way the conditions of our national and government way of life.”<sup>2</sup> While toned down in their rhetoric, historians also have focused on the promising innovations of the judicial reform.<sup>3</sup> When they do address problems with the reform, scholars typically point to the 1880s and the government’s efforts to limit the jury’s jurisdiction, which become folded under the label of “counter-reform.”<sup>4</sup> However, dissatisfaction with the reform and official efforts to modify it—in order to improve it—started early.

Discontents with the judicial reform emerged within the first three years of implementation. Moreover, attempts to modify and shape the reform came from both ends of the bureaucratic spectrum. In addition to conservative officials who sought to curb the courts’ independence and sphere of activity, reform-minded officials proposed changes to the new procedure in order to improve its functioning. The public also reacted to the court’s early performance. There were two primary areas of dissatisfaction that generated the most criticism. One was the performance of the jury, particularly with regard to acquittals. This has been treated by historians who have typically focused on the novel aspects of the reform.<sup>5</sup>

The other, less studied area of discontent pertains to what did not change, that is, the preliminary investigation, which was a carry-over from the pre-reform system and still based on the inquisitorial principle. As early as 1869, a governmental commission was created to gather information about and reform the investigation phase, in order to align it more closely with the underlying principles of the reform and improve its performance.

Physicians participated in both phases—the preliminary investigation and jury trial—and tensions and debates surrounding the physician's legal role developed in conjunction with these broader responses to the judicial reform. As this chapter seeks to demonstrate, public dissatisfactions with the reform amplified the physician's role and status in the new judicial process. Many of the early cases that generated the greatest public reaction involved the insanity question—the question of the defendant's mental condition at the time of the crime. These cases piqued the interest of both governmental officials who sought to protect administrative interests, as well as supporters of the reform who sought to protect the new judicial institutions. Under scrutiny from both sides, the role of the medical expert became enmeshed in this force field of interests.<sup>6</sup> At the intersection of political objectives, occupational interests, and the ideology of science, physicians came to play a unique and pivotal role in official and non-official efforts to remedy the problems associated with the judicial reform.

This chapter examines how the physician-expert's role became intertwined with early dissatisfactions with the reform, and efforts to reform state structures more broadly. It is organized around three themes. First, it challenges the periodization of reform/counter-reform and considers the process of judicial reform as an ongoing series of modifications and competing visions over what shape judicial process—and more broadly, the rule-of-law ideal—should take in Russia.<sup>7</sup> To this end, it examines the confusion and stakes that shaped the expert's role in the first years of the reform's implementation. Second, it moves to a discussion of how the combined force of these early problems informed the conflict among medical and legal activists, practitioners, and academics dealing with the problem of the physician's legal role. It analyzes how

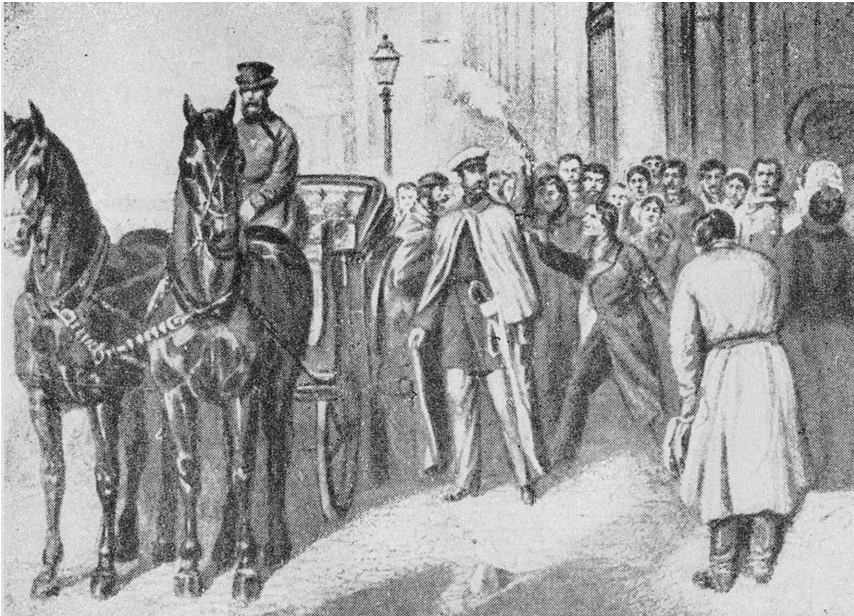
physicians' professional objectives incorporated an effort to preserve and expand their traditional role and authority in the state's judicial system.<sup>8</sup> Third, it summarizes the legacy of the debate over the medical expert's status in terms of the relationship between jurists and physicians. It demonstrates how the earlier calls to enhance the medical expert's role were revised and renewed in the 1890s by new medical views of deviance leading to visions for the future legal order. Major figures from both occupations joined forces in an attempt to rationalize, improve, and extend medical expertise more pervasively throughout state institutions. All three themes interconnect under the broader argument that the professional evolution and interests of jurists and physicians became interdependent in the interest of transforming the state system and their role in it.

\* \* \*

The reformed system opened with a bang. There were two major incidents that tested the new reform even before the court system had a chance to settle down. Less than two weeks before the new courts were scheduled to open, there was an attempt on the life of the tsar. The assassination attempt of 4 April 1866, as depicted in the compilation of newspaper accounts below, had severe repercussions for the judicial reform and the role of the medical expert.

On 4 April 1866, after taking a walk in the Summer Garden in St. Petersburg with companions, Tsar Alexander II approached his awaiting carriage. As the tsar was putting on his overcoat, a young man who had pushed his way towards him took out a pistol and aimed at the tsar. An onlooker who had noticed this young man's strange behavior struck the would-be assassin's arm at the moment he fired the pistol, thwarting the attempt. The "evildoer" was captured at the scene of the crime.<sup>9</sup>

As news spread of the assassination attempt, reaction rippled across St. Petersburg and the Empire. After the event, a crowd gathered at the Winter Palace (the tsar's place of



*Assassination Attempt on Tsar Alexander II. April 4, 1866.*

M.A. Antonovich, *Shestidesiatye gody* (Moscow–Leningrad: Academia, 1933).

Courtesy of Library of Congress.

residence), theatre performances were halted and repeated hymns were sung in their place, a poem entitled “4th of April 1866” was written and presented on stage, and icons were laid at the place of the “saving.” In the days that followed, the local newspaper was filled with telegrams of support from every corner of the empire and abroad, representing every social group—from individual peasants to heads of state to the Riazan nobility, the Odessa merchantry, and students of the Kazan seminary academy, to name a few. The person who thwarted the attempt, a peasant named Osip Komisarov, became an instant local celebrity. The tsar personally raised him to noble status, telling the city duma that “I hope you, gg. nobility, warmly accept to your sphere the former peasant, whom I just raised to nobility, who saved my life. I think that by this he completely deserves the honor of being a Russian nobleman.” Among other honors, the

former peasant's portrait was hung in the duma, a landowner from his birthplace sought to present him with land, and one night he was spotted at the Marinskii Theatre, seated prestigiously in a private box with friends. The new hero twice was called to the stage to the crowd's loud cheers, while the chorus performed multiple renditions of "God Save the Tsar!"

Alongside these public responses, an investigation into the perpetrator was quietly underway. In less than a week after the shooting, Count M. Murav'iev was designated as the chairman of a commission assigned with the investigation. The perpetrator's identity remained a mystery for over a week, amidst growing interest and rumors about the identity of the "evildoer."

On 13 April the would-be assassin's identity was finally announced. Dmitrii Vladimirov Karakazov was described in first order as suffering from fits of melancholy. Several of his friends testified to this, and he had spent more than a month in a clinic under Moscow University, where he had been a student, and later was treated by St. Petersburg physicians when he arrived in that city. In addition to this, he was identified as a socialist, having "developed ideas of the most extreme socialism." The two conditions were viewed as related. As the newspaper report asked, "Is it any wonder that [Karakazov] was found by people, who take advantage of precisely this ill mood of a person, in order to further inflame his fanaticism and push [him] towards such an evil act unheard of in Russia [*Rus'*]?" Mental illness, and melancholy in particular, was thus identified as a potential political danger, being fertile ground for social views that threatened Russia itself. Such a person, the report read, shared nothing in common with the Russian people [*narod*], "either in estate [*soslovie*], or in the general sense of the word," and could not be considered of "Russian nationality" (although legally he was). Yet the underlying cause of his "evil" turn, subversive beliefs, and un-Russian act, as depicted in the press, was the mental disorder of melancholy.<sup>10</sup>



*Sketch of D.V. Karakazov's face.*

*As a young art student, Ilya Repin drew this representation of would-be assassin Karakazov in 1866.*

Ilya E. Repin, *Dalekoe blizkoe*. Ed. and intro. K. Chukovskii.  
(Leningrad–Moscow: Iskusstvo, 1937).

Courtesy of the Slavonic Library, National Library of Finland.



Contemporaries feared that the assassination attempt would delay the opening of the courts, but they opened as scheduled (17 April in St. Petersburg and 23 April in Moscow).<sup>11</sup> While the timetable was not affected, the event itself carried consequences for the judicial reform in terms of the administration's response to it, the potential danger associated with melancholy,<sup>12</sup> and by extension the stakes attached to the role of medical expertise.

The assassination attempt spurred administrative reaction and exacerbated tensions between the administration and the new judicial reform. The sites of this tension have been well documented by historians, and played out largely between the Ministry of Internal Affairs and Ministry of Justice.<sup>13</sup> While these tensions predated the event, it was after the Karakazov shooting that Minister of Internal Affairs P.A. Valuev started more overtly to advance the administration's interests over judicial principles, and began an offensive to strengthen the administrative authorities in relation to the independent judiciary. Valuev sought in various ways to subordinate the courts to administrative needs.<sup>14</sup> The process for adjudicating insanity would be one of them.

Acquittals based on insanity, promoted by physicians' testimony, became enmeshed in the complex of official interests and public responses to the reform. Prior to the reform, the question of an offender's insanity and legal responsibility was an administrative issue (just as, for example, press cases had been). Questions of mental capacity were determined by commissions in administrative boards under the authority of the Ministry of Internal Affairs.<sup>15</sup> The transfer of this authority to the newly independent courts, and more specifically, to individual physicians and juries became a contentious issue for both opponents and supporters of the new jury courts, as will be further examined below.

The opposing political tensions were heightened in the wake of the assassination attempt, when another "melancholic" offender attacked a state official. This time, however, the attack occurred after the new courts had opened, and the case was therefore adjudicated publicly under the new judicial procedure. The trial turned on the question of the defendant's mental condition. Consequently, questions of the procedural role of medical expertise and jurisdiction

over insanity were at the intersection of these competing interests and views on what shape the judicial reform should take.

The events of the Protopopov case took place in St. Petersburg only three months after the assassination attempt. This second public case of insurrection is less known to Western historians than the Karakazov attempt, but was sensational in its day. Moreover, for the next two decades, journalists, publicists, physicians, and jurists used this case as a departure point for the reevaluation of the judicial reform once it was in operation, including the functioning of the jury, and the allegedly baneful influence of the physician-expert (and, in particular, his psychiatric explanations of behavior) in the new courts.<sup>16</sup> The general outline of the case followed the contours of the Karakazov event, if ratcheted down a few notches in scale. A Ministry of Internal Affairs official was the target rather than the Tsar, and the fists rather than a pistol were the means of assault. Nevertheless, the attack carried similar political weight and symbolic value as a public display of insurrection against official authority and threat to social order. The role of the physician-expert became politically charged from the start.

### THE PROTOPOPOV CASE

Responses to the public role of the physician-expert and to the judicial reform were intertwined from the first years of the reform. The Protopopov case illustrates and helped initiate this process. In the first years of the reform, criticism of the jury came from two sides. At one end, the administration (particularly the powerful Ministry of Internal Affairs); at the other end, a public reaction to acquittals (particularly of those defendants who had confessed, which under the pre-reform system guaranteed conviction). The physician-expert was central to and contributed to both of these currents. While it was the public trial of Protopopov that set the political stakes, the appeal process served as a forum for laying out

and arguing the underlying issues and competing sets of interests: with the administration's interests represented by the prosecution and reform interests represented by the defense. Out of this appeal process, the Senate's Cassation Department produced a judicial decision that served as a landmark in establishing the courts relationship to and jurisdiction over medical experts. The Protopopov case was both unique in its consequences and representative in the issues it raised, and as such, warrants closer examination.

\* \* \*

On 4 July, at 3:00 o'clock in the afternoon, a minor official (*kollezhskii sekretar*), Nikolai Protopopov, entered the office of his superior, Count Koskul', the vice director of the Department of Spiritual Affairs of the Foreign Confessions, of the Ministry of Internal Affairs. Protopopov announced that he was offended by the placement of another individual in an administrative position to which he himself felt entitled. Without waiting for an answer, Protopopov lunged at the vice director and began to strike him in the head. At that point, colleagues entered the room and pulled him off. Protopopov was charged with assault and battery of his superior. After the attack, he was questioned by the investigator and reportedly answered the questions clearly and in full mind.<sup>17</sup>

The issue of Protopopov's dubious mental condition arose several times during the nine-month investigation, conducted by investigator P.V. Makalinskii.<sup>18</sup> Continuing the pre-reform tradition, physicians were immediately drawn into the criminal process, as a result of the accusation leveled against the defendant.<sup>19</sup> Indeed, investigators were obligated to invite physicians under the new system, just as they were and according to the same rules as under the previous system. The chief difference for physicians was that their participation after the reform was highly visible, and subject to challenge, in the new and very active jury courts, the "centerpiece" of the judicial reform.<sup>20</sup> Besides opening to standing-room-only crowds, the activity of the jury courts was followed closely by an avid press.<sup>21</sup> Along with physicians' new visibility,

the expectations attached to them also rose; efforts were underway as early as 1867 to bolster the medical ranks for their new task, with physicians being sent to St. Petersburg's Medical-Surgical Academy for "improvement in forensic medicine."<sup>22</sup> While physicians had served the Russian courts for centuries, their newly public role placed their significance in a new light.

Relatives and colleagues testified to Protopopov's erratic behavior and mental disorder in the days prior to the criminal attack. The first notification about his disturbed mental condition came from his sister, who testified that her brother, in the 3–4 days prior to the event, was in a "strange condition": he did not sleep, eat, or speak, and with staring eyes walked from corner to corner, constantly wincing. This testimony was corroborated by two other witnesses in the course of the investigation. Later still, Protopopov himself began to account for his violent behavior in these terms, telling the investigator that he suffered from a "fit of frenzy" during the attack (using language that corresponded to the criminal code's definition of non-responsibility).<sup>23</sup> Under such circumstances, when indications of a defendant's mental disturbance arose in the investigation, it was the procurator's responsibility to initiate the official judicial/administrative examination of the defendant's mental condition—and based on that outcome, determine whether or not to terminate the case. In Protopopov's case, the prosecution did not initiate such an examination, and the case went directly to trial.<sup>24</sup>

Because it was mentioned in the pre-trial dossier, the issue of insanity again arose in the trial, which began in March 1867. Both parties called physicians, but the two sides disagreed over Protopopov's mental condition. Because Protopopov appeared to be thinking clearly at the time of the attack, the claim that he was simultaneously in a state of mental disorder was contestable. Contemporary understandings of "melancholy" encompassed this seeming contradiction.<sup>25</sup> The defense lawyer invited physician Chekhov, who testified that Protopopov committed the crime in a "fit of melancholy," and that having committed the crime, he could both recognize its severity and at the same time be in a "fit of frenzy" (*umoiztuplenie*).<sup>26</sup> The prosecution's physicians gave an opposite account, and focused on his presence of reason throughout.

Testifying for the prosecution were the two physicians who initially examined the injuries of the vice director after the attack. Investigator Makalinksii had asked the two physicians, Meingardt and Lozinskii, about Protopopov's mental condition: "Could one allow that the accused suffered unconsciousness or clouded reason, without disorder of his mental abilities [*umstvennye sposobnosti*]?" The first physician, Meingardt, who had worked under the Ministry of Internal Affairs for eight years, refused to give any kind of answer, saying that Protopopov's organism was "not so familiar to him." He also testified that during his tenure at the Ministry of Internal Affairs, Protopopov did not have "such an illness which would lead to frenzy or complete unconsciousness."<sup>27</sup> The other physician, Lozinskii, was present during the initial questioning of Protopopov after the attack, and concluded that Protopopov possessed "complete reason and full consciousness" based on the "correct structure" of his body, and on the "consistency and logic" of his answers after the attack.<sup>28</sup>

Both the defense and prosecution focused exclusively on Protopopov's mental condition in their concluding speeches.<sup>29</sup> In his concluding argument, Procurator Shreiberg attempted to refute the defense claim that Protopopov suffered from "melancholy" and "frenzy." After speaking generally about the legal definition of responsibility—"committing an act under the possession of reason and freedom"—he also reviewed the mental conditions that led to legal non-responsibility (*nevmeniaemost'*).<sup>30</sup> He did not deny the existence of such conditions or disease categories, but asserted that they were not proven or applicable in the given case. In the procurator's words, "[i]n the absence of positive evidence, everything must be explained only by the fact that in this case it was not proven that the defendant actually committed the crime in a fit of frenzy. In the present case, not only was it not proven ... but in my opinion the opposite was proven ... [Protopopov] was in an agitated and irritable condition. But between such a condition and a fit of frenzy exists an enormous difference."<sup>31</sup>

Ultimately, the jury accepted Chekhov's medical opinion (for the defense), and held that Protopopov committed the crime in a fit of frenzy, thereby rendering him not legally responsible. He was

acquitted, and pronounced “free from the court.” Upon this announcement the public audience broke out in applause, just as they had done after the defense lawyer’s concluding speech.<sup>32</sup>

The minister of internal affairs made known his displeasure with this verdict. Valuev carried his struggle to the press in his newspaper *Vest'*, attacking the courts for revolutionary designs.<sup>33</sup> Heads rolled. At Valuev’s instigation, in May 1867 Minister of Justice D.N. Zamiatnin was dismissed from his post. The Protopopov acquittal, together with Zamiatnin’s position on earlier cases (refusing to intervene on behalf of administrative interests) had made it appear that the Ministry of Justice needed a chief more sympathetic to the goals of the administration.<sup>34</sup> Zamiatnin’s interim replacement for six months was Prince Sergei N. Urusov, who held the post until Count Constantine Ivanovich Pahlen took over in October 1867. Valuev personally selected both men, whom he viewed as more loyal to interests of the administration.<sup>35</sup> The new Minister of Justice Pahlen proved him correct. According to the diary of one contemporary, Pahlen “had a talk with the chairman of the local district court, and ... explained that the jury did not justify the expectations of the government, which hoped to find in it a conservative element, but instead finds the opposite.”<sup>36</sup>

Although the acquittal was a clear and very public defeat for the administration, the battle was not entirely over. The prosecution appealed via the Cassation process.<sup>37</sup> It was in the appeal phase that the two sides presented their competing visions regarding the appropriate procedure (and center of authority) for determining a defendant’s mental condition and culpability—which, as Protopopov’s trial demonstrated, was a potent factor under the new jury courts. The primary grounds for the protest was the fact that the officials had not conducted a preliminary examination of Protopopov’s mental condition. Instead the issue was decided at the new trial phase by “unofficial” experts and the jury. All threads of the protest led to an objection to legal forms and processes that were not linked in some way to the administration. This included two items in particular, both pertaining to expertise. First, the prosecution protested that the question of mental condition should be decided only via the official, administrative, closed-door session

(carried over from the pre-reform period, and incorporated into the new rules of procedure as Articles 353–56)—and should not be left to the jury. The second objection extended to the type of physician who could be called to testify at court.

Confusion over who was to be considered an “expert” was a common problem in early cases.<sup>38</sup> In the Protopopov case, however, the controversy over this question was related to the prosecution’s efforts to limit emergent pockets of independent authority in the new courts. This included physicians called to testify at court.<sup>39</sup> The prosecution objected to the defense’s use of a physician (Chekhov) who was not “official” and was allowed at court to make “arbitrary” pronouncements.<sup>40</sup> As the procurator summarized his objections to the Cassation judges:

Not knowing the defendant up to the present time, not having treated him earlier, not being invited for his (official) examination [*osvidetel'stvovanie*] during the preliminary investigation—but being invited to the judicial investigation [trial] upon the request of the defendant, as an expert, for the explanation to the court about Protopopov’s mental condition during the commission of the crime [such physicians were not reliable].<sup>41</sup>

The problem with such “experts,” the procurator argued, was that physicians of this sort (who testified independently at trial, free of any administrative linkage) were not bound by any parameters or restrained by the particular questions of investigative officials. Parameters such as these would contain the direction of medical testimony, and prevent physicians from “giving arbitrary bounds to their conclusions,” as Chekhov was accused of doing—to the peril of the state’s case.<sup>42</sup> In sum, the prosecution sought to rein in the discretion both of the jury and physicians from speaking to and deciding matters (such as mental condition and legal responsibility) that had previously fallen under the state’s administrative purview.

The defense lawyer Khartulari represented an opposing vision of both the reform and the experts, and like the prosecution, he

also set the stakes high for the case. The defense saw the outcome of this high-profile case as fateful for the future of the new courts. If the Cassation Court annulled this particular verdict, the defense argued: "It will create a precedent in our young native judicial practice, and I say further, perhaps almost unique in the general history of open proceedings, and upon this example one can unmistakably predict that in the future no single verdict of the jury will retain its legal strength, and in this way, the 'court of conscience' is made only an empty lifeless form, undeserving of its name."<sup>43</sup>

The defense also challenged the traditional definition of a forensic physician, based exclusively on state-defined and regulated service titles (*zvanie*). Moving away from traditional, official criteria for legitimating one's authority as an expert, the defense bolstered his argument by reference to foreign example: "I do not know of any European legislation which would limit the defense in the choice of experts, and I think that all legislation, including ours, requires a more reasonable guarantee from experts, than for them to belong to a known, official circle."<sup>44</sup>

In this way, the defense lawyer's arguments to protect the independence of the courts were linked to the promotion of new criteria of authority for the physician-expert that were separate from state categories. According to this vision, the reform was to sever experts—like the courts—from their former administrative roles, identities, and affiliations. In conjunction, the defense lawyer sought to remove jurisdiction over the insanity/responsibility question from its former administrative vestige and have it placed under the new discretion of the jury courts and physician-experts.

The Senate's Cassation Court sided with the defense and rejected the challenge. Besides signaling a victory for the independence of the newly reformed courts (and final defeat for the administration), its decision also firmly granted courts full discretion over the manner and use of expertise in general. The Cassation judges stated a more general conclusion and cast the net wide when defining the court's discretion over these matters. "The court is not constrained either in the choice of ritual and methods of the *ekspertiza*, or in the designation of the number or choice of experts, or in the



determination of the period of observation.” Eliminating the possibility of any confusion, the judges added, “[i]n a word, the court is presented by law, in this regard, discretionary power.”<sup>45</sup> This decision served as the fount for all subsequent rights granted to physicians in future decisions. This blanket discretion granted to courts also encompassed the matter of jurisdiction over the question of insanity. The decision spurred and solidified the transformation of mental condition as an administrative issue (open to administrative intervention), to a judicial one, to be decided independently of state control. As the Cassation judges explained, once a case went to trial, the pre-trial examination by administrative commission “loses its absolute character” and the question of mental condition becomes “a matter of fact” to be decided by the jury.

### Outcome

Despite efforts by the Ministry of Justice to preempt cases such as Protopopov, it was not wholly successful. To be sure, other factors besides prosecutorial oversight enabled defense lawyers to frequently blindside procurators at court by raising the issue of mental condition; among these was the expansive list of conditions that according to Russian law (dating back to 1835) led to “frenzy” and thus non-responsibility.<sup>46</sup> Nevertheless, the Ministry of Justice focused on the procurator’s role, seeking tighter control over cases that involved mental condition. The Ministry of Justice responded quickly to the Protopopov debacle. A circular to procurators instructed them to be attentive in calling for the conduct of the pre-trial commission examination of defendants whose mental condition was in question.<sup>47</sup> Despite the circular’s strong wording, it did not stop the problem: cases of this sort continued to take place, and the procurators involved appealed on similar grounds.<sup>48</sup>

Such cases led to two consequences: first, as discussed above, the courts gained full discretion over questions of mental condition, responsibility, and medical experts more broadly—at the expense of the administration’s former jurisdiction over these functions.<sup>49</sup> In subsequent decisions, the Cassation judges severed the

administration's ties to decision-making regarding a defendant's ambiguous mental condition (excluding the most pronounced forms of legal insanity); in doing so, they referred to foreign legislation to support their action. However, though Cassation judges in their ruling—as in other moments that steered away from tradition—seemed to bow to European experience, their decision was clearly mindful of and tailored to Russian circumstances.<sup>50</sup> There was a flip side to this: the transfer of cases of ambiguous mental condition into the hands of physicians in the open courts led to a public reaction against acquittals based on insanity—and by extension, against juries and experts. While not all sensational cases that included medical expertise were psychiatric, it was the psychiatric cases that generated the most vehement public response. Under the new system, which for the first time incorporated mental condition as a factor of guilt, the acquittal of confessed defendants (based on physicians' claims of mental disorder) was as novel and controversial as the jury itself.<sup>51</sup> In this sense, it was not, as in other countries, the novelty of the psychiatric ideas that underlay the controversy over expertise, but the transformation of the setting in which age-old ideas were employed. As one physician put it, "Our physicians are now living through that time, which French physicians found themselves in the 20s and 30s of this century, when [psychiatrists] Esquirol and Marc had to convince judges and jury of the ill condition of criminals."<sup>52</sup>

Already in 1867, a backlash against the physician-expert appeared in the press.<sup>53</sup> At the core of the attack was the question of physicians' definition of non-responsibility. Attacks appeared in newspapers such as *Vest'* and *Moskva*. In a lead article in the latter newspaper, the author questioned the legitimacy of the category of "frenzy" and its application to judicial practice, with regard to recent criminal cases, including Protopopov.<sup>54</sup> The author accused physicians of "inventing" the illness, and complained that frenzy in one case led to the defendant's non-responsibility, and in another, served as grounds for the suspension of the trial, for further mental examination.<sup>55</sup> The author further accused the physicians of ignorance in their matters and chided that "in place of judges

should sit physicians, and above the jail a sign should be hung: ‘insane asylum’ [*dom umalishennykh*].” Underlying the attack on physicians was the perceived threat that they (and their use of “frenzy”) posed to the new judicial institutions and society itself. The author warned that soon physicians will start to explain all crimes in this way, and then, “there will be no need for courts.”<sup>56</sup>

By 1870, only three years into the reform’s implementation, the role of the physician-expert was challenged from two directions. The stakes and controversy attached to medical expertise became intertwined with responses to the reform by those wishing to curb the jury’s role at one end—and those who sought to protect it at the other.

### From the Physician’s Point of View

The external challenges to the physicians’ role were matched by conflict within their ranks. Physicians were acutely aware of public dissatisfaction with their role; as early as 1867 one physician lamented: “The activity of experts is analyzed, compared, and evaluated. Each opinion is reviewed and criticized by the interested public, not only in relation to itself, but also in relation to the individual who spoke it, i.e., to the individual and social status of the physician. In a word, before the public the important significance of forensic medicine in the case of jurisprudence and social well-being is beginning to be revealed.”<sup>57</sup>

Physicians also paid attention to their influence on verdicts. Though this question has always been elusive, Russian physicians were able to approach it concretely in the early years, via the published “résumés” of the court chairman. These résumés stated the jury’s basis for determining the significance given to experts.<sup>58</sup> That physicians followed these reports is clear from commentary surrounding one case in the Moscow district court, in which a peasant was accused of intending to poison her father and sister. The physician-commentator, M.G., noted that “we cannot know on what basis the jury recognized the defendant Praskova guilty” because “the report about the trial was not printed anywhere.”<sup>59</sup>

He was confident, however, that it was based on the physician's conclusions.

Physicians attributed the uneven quality of their performance in large part to the confusion and limitations surrounding their new procedural role. To be sure, there was no love lost for the former system. As one physician put it, "[t]he old works of physicians were turned over to the local archives; we will not touch them; let them rot there with the cases of the secret court or be eaten by mice."<sup>60</sup> Nevertheless, the new system brought a new type of complaint. Physicians, particularly those who had practiced before the reform, were unprepared for and objected strongly to having their conclusions challenged (particularly by the defense) under the new adversarial system. Physicians entered the new courtrooms accustomed to the pre-reform written proceedings, under which the main judicial actor was the court secretary, who not only did not understand the medical terminology, but was not interested in the physician's testimony, especially when the event of the crime was proven.<sup>61</sup> This indifference changed under the reform. Attesting to this change was eminent jurist and lifelong advocate of medical expertise, A.F. Koni, who began his career as an assistant procurator in provincial district courts, when they first began to operate under the reform. He worked in the university cities of Kharkov and then Kazan for upwards of fifteen years, attending university courses in forensic medicine along the way, out of personal interest.<sup>62</sup> Though typically less devoted to the subject than Koni, lawyers under the new system possessed knowledge of forensic medicine to varying degrees upon graduation from legal faculties—where forensic medicine was taught as an elective—and they wielded it against physicians. Based on his personal experience, Koni described "the appearance of young jurists, familiar with forensic-medical literature and having the temerity to disagree, argue, and in their public speeches regard negatively the conclusions of *ekspertiza*."<sup>63</sup> He witnessed firsthand such attacks by the defense, even stepping in to the aid of one embattled physician in a Kharkov case, in which he was serving as procurator.<sup>64</sup>

Physicians felt the contrast with the old system sharply. While medical conclusions were deemed "perfect proof" under inquisito-

rial procedure—shaping legal outcomes and accepted uncritically by judges—the very legitimacy of physicians' authority was assailed after the reform. Public disagreements between physician-experts were another novel byproduct of the new system that lawyers (and opponents of medical experts) used in order to discredit medical authority. This early response to physician-experts is illustrated in one 1867 jury trial in the Kashin district court.<sup>65</sup> In this case, Natal'ia Sergeeva was accused in the attempted murder of her husband. While sleeping, he suddenly felt a pressure on his neck, and awoke to find his wife grasping a knife. A struggle ensued, they both fell to the floor, and finally his wife let go of the knife.

Three experts participated in the case to determine the character of the victim's injuries. They disagreed about the severity and origins of the marks on his body. One referred to the injuries as those "that could have a harmful influence on one's health and even be dangerous for one's life"; the second physician concluded that one of the marks was an abrasion; and the third expert concluded that the injuries were "light" and therefore "did not have a harmful influence on the health of the victim."<sup>66</sup> Moreover, there was disagreement over whether a particular welt was caused by a stab or a cut. Besides seeking information about the injuries, both parties questioned a physician on the defendant's state of mind at the time of the attack. To the procurator, he answered that since she "was not pregnant, one had to find the cause of her crime in the particular mood of her spirit [*dukh*]" at the time of the act. In turn, the defense lawyer asked whether or not Natal'ia Sergeeva committed the crime in "a peaceful disposition of spirit"? The expert did not confirm mental disturbance as the defense lawyer might have liked, stating instead that "I do not see from the judicial investigation information which would allow me to give a positive or negative answer to your question."<sup>67</sup> In these early years, it was fair game and indeed common for jurists to refute medical conclusions by simply rejecting physicians' legitimacy as authorities, and/or the authority of medical knowledge. In the Kashin case, the defense lawyer did just that. Because the defendant's mental condition was central to his case, in his concluding argument the defense lawyer sought to undermine medical authority by exploiting the disagree-

ments between physicians: "With regard to the opinions of the expert-physicians, I will not expand much on that. What kind of experts [*znatok*] of the soul are they, when they cannot distinguish injuries from abrasions? ... And such people take it upon themselves to talk about that which goes on inside of us!"<sup>68</sup>

Such experiences in the courtroom led physicians to object from the start to their new status under the reform. Kiev physician Ergardt called such adversarial questioning "unnatural" and complained it disturbed the "friendly relations" between physicians and jurists; another proposed that physicians participate only at the preliminary investigation, and skip the public trial phase altogether.<sup>69</sup> One medical commentator recalled an anecdote that in one city a physician was driven by a defense lawyer's questions to an untenable position, and after returning from the trial session he "lost his mind."<sup>70</sup> Moreover, there was widespread confusion among judicial actors of all stripes as to the physician's precise status under the reform. Much of the problem stemmed from the common practice in Russian law of layering new legislation (the judicial reform) over the old, but still active administrative rules (Statute of Forensic Medicine), and the clash between the two depictions of the physician's legal identity and status therein. Because the irregularities under the new courts affected both district physicians and the most celebrated academic specialists, the issue of the physician's status bridged the otherwise highly stratified medical occupation in a way other contemporary occupational issues did not. While the forms of confusion varied from case to case, physicians' complaints quickly centered on being treated as mere witnesses, which denied them the privileged status and discretionary authority they enjoyed before the reform.<sup>71</sup>

### PHYSICIANS AND THE STATUS QUESTION

During the first years of the new courts' operation, the tensions surrounding them, and the physician's role in particular, spawned a series of efforts and proposals from jurists and physicians alike to

correct the problems.<sup>72</sup> Responding to the early attacks on both jury and expert, a young law graduate at Kharkov University in 1869 pulled the muddled question of expert status into the realm of legal theory.<sup>73</sup> With his 1869 dissertation, "About the Significance of Physician-Experts in Criminal Proceedings," he ignited two decades of debate on this issue.<sup>74</sup> Leonid Vladimirov graduated from Kharkov University with a degree in "science" in 1866, the same year as the courts opened, and for the rest of his career, he would combine these two pursuits (science and the reformed judicial system) in his works.<sup>75</sup> His overarching objective was to improve the courts' functioning. Vladimirov was representative of his generation in the second half of the 1860s, as he recalled in a speech: "We, the young scholars of that time, threw ourselves at the study of reform, with the burning desire to support [these reforms], to study the conditions of their success and prepare them for a favorable footing in life."<sup>76</sup> A strong supporter of both reform and science, Vladimirov called for an expansive and privileged role of the physician—a representative of science—as the best means for improving the operation of the new courts, and jury decisions.<sup>77</sup> This activist, more than any other, represented a certain pole in the force field of debate, and therefore his background warrants closer examination.

For Vladimirov the key was to separate medical *ekspertiza* from all other types, and to define the status of the physician as that of a "scientific judge." The physician's status in the legal process, Vladimirov argued, would "guarantee justice."<sup>78</sup> As he described it, his objective was to indicate the "rational principles" of the legal organization of medical expertise, and to give it a procedural status under which "the scientific investigation of truth would not meet any obstacles." The obstacles he had in mind were jurists' ignorance of forensic-medical questions and their (and juries') inappropriate criteria for evaluating physicians' conclusions. While his aim was motivated by the reform ethos of his day, his solution had roots in the pre-reform period. He sought to improve and hence secure the new judicial institutions by reestablishing and updating the physician's pre-reform role, that is, an autonomous sphere of authority that was immune from external challenge or evaluation, and carried obligatory weight in legal

decision-making.<sup>79</sup> The state of institutional flux and extensive judicial revision that accompanied the judicial reform made such a proposal more than academic.<sup>80</sup> Describing his work retrospectively, Vladimirov explained that it “appeared at the time, when in our barely born practice of the new judicial process arguments were still possible about whether one should view the expert as a witness.... I was first to introduce the thought that the expert is not a witness but a scientific judge of the special side of the case ... and in accordance, his status in the process, and his rights should be refined and worked out.”<sup>81</sup>

Vladimirov's proposal also reflected an attempt to correct aspects of the reform that broader official and public circles recognized as flawed, namely the pre-trial investigation.<sup>82</sup> Besides seeking to rationalize and improve the judicial process by giving medical experts a greater role, he also sought to make the benefits of expertise more accessible to the defendant, in keeping with a view voiced by other physicians.<sup>83</sup> In this respect, his proposal coincided with contemporary discontent with and official efforts to reform the preliminary investigation—a holdover from the pre-reform system—and introduce the same principles of *glasnost* and adversarial procedure<sup>84</sup> characteristic of the jury trial.<sup>85</sup> To this end, Vladimirov argued that the defense lawyer should have an opportunity to call his own experts in the investigation phase, rather than leave full authority for this with the prosecution, and thus in the hands of state interests.

Given the novelty of his topic and approach within the traditional confines of Russian legal faculties, how did a maverick like Vladimirov secure a successful academic career? While Vladimirov's work clearly reflected the progressive currents of his day, it also reflected the intellectual interests of his highly-placed mentor. Vladimirov's rapid rise up the academic ladder was due to his powerful mentor Aleksandr I. Paliumbetskii (1811–1897) who was chair of the Department of Criminal Law and Procedure, dean of the legal faculty, and then rector of Kharkov University. Like his protégé Vladimirov, he was possessed of an “unwavering love of science,” and advocated its role in understanding of law.<sup>86</sup> Paliumbetskii began his academic research with the study of evidence,



considered Russian law in comparative context, and later focused on the judicial reform.<sup>87</sup> One finds a parallel track of interests in Vladimirov.

Upon publication, Vladimirov's monograph created an immediate stir in both the medical and legal communities. One measure of the impact and reception of his work is its publishing record. Vladimirov's dissertation was published in 1870, and in the same year a second publication appeared. All copies of this second edition, reportedly, also "disappeared" and in 1886, a third edition was published—in his words, "a bibliographical rarity."<sup>88</sup> The interest in his works did not flag with his later edition, and after his third edition came out in 1886, one medical reviewer encouraged further readership, stating that "one finds in the work of Prof. Vladimirov a variety of things [that are] most important for the physician-expert ... in general one should wish the dissemination of it among physicians."<sup>89</sup> In keeping with its popularity, his work shaped debate on and definition of the subject, in both legal and medical forums and publications. No subsequent commentary on the role of the medical expert—be it a textbook, monograph, or conference presentation—failed to mention Vladimirov.<sup>90</sup> Moreover, his influence in Russian literature on the topic was lasting. While there was never a tidy conclusion to the debates, his original line of thought and exposition on the different "camps" was adopted by jurist I. Ia. Foinitskii in his textbook on criminal law, and incorporated into nineteenth- and twentieth-century Russian reference works and monographs on *ekspertiza*.<sup>91</sup>

To justify his proposal for the dominance of medical authority, while not undermining the institution of the jury, Vladimirov offered a benign account of deference to scientific authority. In the setting of reform-era Russia, with the autocratic authority of the state itself under attack from different directions and by various segments of society—the prospect of replacing the state with another form of supreme authority was indeed a delicate issue. Vladimirov was aware of this. "We know that they reproach us in the wish to subjugate the courts to the authority of physicians," he wrote. To address this concern, Vladimirov justified the need for authority as a sign of progress and a primordial need. On one hand,

the need could be traced to childhood—"the first steps a person takes are done under the indubitable supervision of authority"—on the other, it was a byproduct of civilization, with its specialization of knowledge and function.<sup>92</sup> "He who has a complaint turns to a lawyer, he who is sick turns to a physician, he who is building a house—to an architect," he offered. In this way, Vladimirov attempted to soften the superordinate role that he proposed for the physician-specialist. "Such appearances fill our everyday life," he assured, "they also constitute the signs of civilization."<sup>93</sup>

The view that Vladimirov proposed and the debate it engendered was unique to the Russian context. Vladimirov firmly situated his position in relation to other foreign models, while at the same time rejecting them in favor of his more expansive view.<sup>94</sup> Most striking is the way in which Vladimirov and his subsequent medical supporters diverged from their foreign counterparts in pursuing the status debate. To be sure, physicians in all countries objected to being treated as witnesses—even when they were legally designated as such, or in the absence of cross-examination (as in France).<sup>95</sup> In England and the United States, the conclusions of experts were equated with witness testimony. The same was true in France; although French legislation did not include any statutes about evidence via experts, physicians (and other experts) were included in the witness list. In German law, experts were referred to as "knowledgeable witnesses" and they were subject to the rules for witnesses.<sup>96</sup> To be sure, physicians in these countries were often dissatisfied with their own systems of organization of forensic medicine and expertise.<sup>97</sup> However, there was no comparable debate over the procedural status of the expert as there was in Russia.

This divergence is most vivid when one looks to Germany, whose system of forensic medicine was closest to—indeed, the model for—the Russians.<sup>98</sup> Moreover, Russian physicians and jurists (including Vladimirov) borrowed heavily and almost reverentially from their German counterparts in most areas of scholarship. However, with respect to debates on the physician's status, the Russians not only diverged from German authorities, but rebuked them for *not* engaging in this important matter.

While Russian physicians' complaints stemmed in large part from the relative authority of the physician to the investigator, German physicians tended not to find a problem with this, although they had a comparable set of procedural rules.<sup>99</sup> Casper, the most prominent representative of German forensic medicine, ignored the issue. He recognized that there was much dispute over the question of "whether the presence of the judge at the medico-legal examination is necessary or judicious or neither?" But in his opinion, the presence of law officials at the examination of the body was a "self-evident necessity."<sup>100</sup> Moreover, he did not feel such discussions were even the proper business of physicians, and belonged instead to the "legislature of the State, and not to medical jurisprudence." Ultimately, he found the entire issue meaningless. "These tiresome discussions ... are quite worthless in practice, for every forensic physician knows full well that he neither has, can, or ought to have any 'status' or 'relation' to the judge."<sup>101</sup>

Vladimirov objected strongly. In his view, and that of his supporters, it was unacceptable to leave the issue undefined.

The expression "the physician is a physician and nothing more" and "the physician at court does not occupy any kind of status, and does not have and should not have and cannot have any kind of relationship to the judge ..." although it is very energetic, does not explain anything. Casper's mocking is also completely inappropriate, and most important, does not lead to any results. The question about the status of the forensic physician therefore was not worked out, and the procedural essence of expertise and the legal understanding of the expert remained unclarified.<sup>102</sup>

Later in the century, physicians continued to break with and criticize their otherwise emulated European counterparts for their silence on the issue.<sup>103</sup> While the issue of the expert status and authority did not resonate with physicians in the European context, Russian physicians, in the following decades, fervently embraced Vladimirov's ideas and incorporated them into their professional mission as they acquired new organizational forums in

the 1880s. These forums facilitated physicians' collective shaping of a new public identity and redefinition of their role in state institutions.

### Reception

Medical reviewers hailed Vladimirov's views.<sup>104</sup> This is not surprising, as Vladimirov's theory offered physicians precisely what they sought amidst the disorder and discontent surrounding their new role in the courts. Initial responses ran the gamut of the medical occupation, from provincial state physician to top-ranking medical official in St. Petersburg. Having been a prominent advocate of science in the courts since the introduction of the reform, E.V. Pelikan, director of the Medical Department, offered the first glowing imprimatur. Vladimirov's views coincided fully with Pelikan's vision of the role that science should play in the courts to improve them. "One must agree with the conclusion of Vladimirov, it is completely rational. I have constantly promoted such a view of the physician-expert, both in the university department and in the press—and how much more pleasant it is to see that this is beginning to acquire supporters in the sphere of educated jurists."<sup>105</sup> The influence of Vladimirov's views spread so rapidly, and became so entrenched that by 1875 commentators were already divided into "camps."<sup>106</sup> His call to expand the physician's legal role contributed to the social and political debates of the last quarter of the century.

This question of expert status retained its force for medical practitioners even as their occupation was changing. By the time physicians organized on a national basis in the mid-1880s, the medical occupation was larger in number and more specialized. In the two decades that followed the judicial reform, the number of physicians increased by 7,000 (reaching 17,500 empire-wide, where it peaked until 1900); the number of departments within the medical faculty increased from 17 to 23, reflecting increased specialization; and correspondingly, the number of medical societies almost doubled after an intense period of growth in the 1870s and early 1880s.<sup>107</sup> At the same time, psychiatry was coming into its own as a

distinct discipline and specialization; in 1883 the first Russian journal of psychiatry—which included a forensic component—appeared at Kharkov University.<sup>108</sup> With the growth of specialization, academic professors, and psychiatric specialists in particular, were increasingly invited to participate as experts in university cities. This meant that the issues surrounding the expert question involved a growing circle of physicians. New forms of organization afforded physicians a broader audience and collective voice for advancing their campaign regarding expert status.

The first national association of physicians, the Pirogov Society, convened its inaugural congress in 1885, and served as a platform for physicians' collective demands regarding their status under the judicial reform. Historians typically have depicted the overarching objectives at these gatherings and the essence of medical professionalization in general as an effort "to reduce official interference in their professional lives." In this vein, Nancy Frieden asserts that an "anti-bureaucratic stance became integral to their movement for autonomy," and physicians "came to believe that their position as cogs in the state machinery not only stigmatized them as *chinovniki*, but also constrained the proper performance of their professional tasks."<sup>109</sup> However, this depiction ignores a central and particular dimension of Russian physicians' professional outlook. Medical academics and practitioners—at these meetings and elsewhere—campaigns not only to secure but to expand their official role in the state's judicial machinery. Reflecting the complexity of the medical occupation itself (as examined in the previous chapters) the sources to which Russian physicians' looked for their social status and through which they sought to exert authority were diverse, and included their public role under the new judicial system. Alongside efforts to eliminate particular points of state intervention in medical matters, physicians sought to preserve and strengthen their traditional authoritative role in state institutions.<sup>110</sup>

The expert's legal role was a permanent feature on the agenda of the forensic-medical section of all twelve congresses of the Pirogov Society, since its 1885 founding.<sup>111</sup> Questions of a broader nature were constantly being raised. As the *Kiev University News* observed in 1889, "In recent times, in print and especially at physi-

cians' congresses more and more frequently questions are raised regarding forensic-medical expertise and forensic physicians." The commentator saw this as reflecting "the maturity in society and among physicians of the recognition of the importance of forensic medicine in the matter of jurisprudence."<sup>112</sup>

Medical arguments faithfully followed the contours of the theory set out by Vladimirov. Discussion of the physician's legal role took a place on the agenda alongside other concerns to improve teaching at universities; raise physicians' standard of living (and salaries); and reduce state physicians' overburdened workload that combined forensic duties, public health duties, and practice (treatment of the ill).<sup>113</sup> The majority of physicians who spoke out on their role as experts were of the "crossover" generation; they served as forensic physicians before the reform, and objected loudly to the new limitations on their role. It was this generation that most vociferously promoted the views of Vladimirov. At an 1887 meeting, Moscow University Professor of Forensic Medicine I.I. Neiding posed as the central question of his presentation: "What is the physician-expert and what should his relation to the court be?" In answering his own question, Neiding expressed his all-out support and debt to Vladimirov, whose essay "guided me much in the compilation of this presentation."<sup>114</sup> After reciting the Cassation decisions that had granted physicians an accretion of procedural rights up to that point, he proceeded to insist on the redefinition of the expert's status, maintaining that "the view of the expert as witness cannot be considered true ... and the opinion stated by Professor Vladimirov, that the physician-expert is a 'scientific judge' approaches the truth much more closely." Participants at this session of forensic-medicine unanimously supported this view.

At a subsequent meeting in 1893, it became clear that expert status had come to serve as an umbrella under which a broader range of complaints were lodged. One medical inspector from Iaroslavl, A.I. Smirnov, raised other complaints such as physicians' need for an official place to work, just as justices of the peace, investigators, and police boards had. "City physicians in large cities must each day from morning until night rush around, to police districts, then to the chambers of the investigators and justices of the peace, then to

bazaars and little shops with food provisions, and then to different institutions for sanitary inspections, including public houses....”<sup>115</sup> Under these conditions, he argued, it is not surprising that forensic-medical *ekspertiza* suffers. Such “torture” was unacceptable to this Iaroslavl physician, and all the more, not befitting someone with the status of a “scientific judge.”

The core of his argument was familiar. In the absence of the necessary rights and authority, physicians were subject to unacceptable questioning and criticism at court, and at the mercy of investigators’ discretion during the investigation phase. Such a “passive role” of the physician, Smirnov charged, “has a highly dangerous effect on the general condition of *ekspertiza* and even directly diverges with the understanding of its high significance, which the law itself recognized.” On this latter point, he referred to the often-cited pre-reform rule that “verdicts that decide the honor, freedom and life of the defendant are frequently based on the opinion of the forensic physician.” Ultimately, Smirnov called for more “rights and freedom of activity” for the physician at court, and bolstered his view by reference to “separate authors in the legal literature [including Vladimirov] who promoted the idea of the expert as ‘judge of facts’ with corresponding rights.”<sup>116</sup>

While this question was raised and debated throughout the late imperial period, the general view promoted by physicians—that medical expertise was exceptional and privileged—was confirmed by the Senate’s Criminal Cassation Department.<sup>117</sup> The expansion of physicians’ procedural role occurred against a backdrop of increased public dissatisfaction with and governmental incursions into the new judicial institutions.<sup>118</sup> Indeed, by 1875, one jurist frankly acknowledged, “[t]he ten-year practice of the new judicial institutions has consolidated its reputation so much, that at present, one can speak without fears of being suspected of ill will towards them, about both the insufficiency of the judicial statutes of 20 November 1864, and about the insufficiencies of their practical application.”<sup>119</sup> Coinciding with this dissatisfaction with the performance of the reform, jurists in the government invested greater authority in physician-experts. Indeed, by tracing the accretion of Cassation decisions, one finds an inverse relationship

between dissatisfaction with the reform and efforts to bolster physicians' procedural rights and authority.<sup>120</sup>

Throughout the 1870s and into the 1880s, the judges of the Criminal Cassation Department expanded the medical expert's access and autonomy with a patchwork of non-binding decisions.<sup>121</sup> The shared interest in clarifying and expanding the physician's role bridged occupational and social divides. Cassation judges up to the end of the century continued to be almost exclusively hereditary noblemen; while physicians remained of low social background.<sup>122</sup> Nevertheless, social and occupational distinctions did not obstruct the common objective of extending the physician's legal authority. Cassation judges recommended that medical experts be allowed to review all case documents, remain present during the conduct of the judicial investigation, and, with the permission of the court, present questions to the witnesses via the presiding judge, or, with his permission, directly to the witnesses—to name a few.<sup>123</sup> Even jurist Vladimirov had felt that through these Cassation decisions, he had achieved a victory of sorts. By 1886, in his book's third edition, Vladimirov observed with satisfaction that “[Judicial] Practice has accepted my view. It is expressed in the fact that now, in almost all courts, experts are put in the status of a special jury, they are left in the courtroom during the trial, allowed to confer, and general conclusions are taken from them (if they are unanimous).”<sup>124</sup> Physicians who had begun practicing since the first years of the reform confirmed this regularization of court practice, in their favor; that is, courts did, by all accounts, grant the rights that the Cassation Court recommended.<sup>125</sup>

If, however, the Criminal Cassation Department repeatedly ruled in favor of granting the access physicians sought, why did these debates not only flourish, but continue to heat up in the very period the rulings were made? Physicians' efforts and strategy to secure their authority *within* state institutions evolved in accordance with the political objectives of liberal, educated society to protect individual and group autonomy with legally recognized rights.<sup>126</sup> That is, while the campaign to expand and protect the medical expert's authority emerged out of a long-standing tradition of the physician's privileged forensic role, in the later decades of



the century, it also evolved in conjunction with broader liberal currents in society. As the century progressed, physicians sought not only to reclaim their pre-reform level of independence and discretion in the judicial system, but to tie this traditional sphere of authority and influence to the modern notion of inviolable rights which suffused the political agenda of reformers and activists in the second half of the nineteenth century.

In the forensic arena, advocates of expertise justified such demands by looking once again to the West, and sought the legal guarantees their Continental counterparts enjoyed.<sup>127</sup> As Vladimirov stated, “those rights of the expert which in Russia are based only on Cassation practice in Germany are established by law.”<sup>128</sup> The non-binding Cassation decisions were treated as a “privilege,” not a right. In practice, the granting of such privileges was on a case-by-case manner, not according to any overriding legal principle, but according to the all-too-familiar exercise of arbitrary decision-making on the part of the state, or in this case its proxy, the state court official. By recasting Cassation rights into the language of “privilege,” physicians and jurists challenged the state’s traditional method of ascribing legal identity and status through collective privileges rather than corporate rights.<sup>129</sup> Medical and legal activists sought to define the expert’s privileged authority according to new criteria, quite distinct from the state’s bureaucratic system of rewards, ranks, and punishments. They sought to protect the authority and independence of the medical expert, within the state system, by securing the same individual rights that the new legal institutions were intended to create.

More broadly, the reformers sought to eliminate “arbitrariness” (*proizvol*) from the judicial system, in favor of due process and legal guarantees of the rule-of-law ideal.<sup>130</sup> Based on their experiences in far-flung provinces, medical practitioners accepted as a given the fact that in the localities, the interpretation of laws depended on the individual views of the provincial jurists. As one member of the Poltava Medical Section of the Provincial Board explained matter-of-factly, “everyone knows [that] the number of forensic-medical postmortems in a given district will go up or down with the changing of an investigator or police official.”<sup>131</sup> However,

what troubled critics was not the prevalence of individual variability, but the elimination of arbitrariness—or the potential for it—that was built into the judicial system itself.<sup>132</sup>

By the end of the 1880s, physicians engaged or interested in forensic activity presented a unified voice in print and at professional organizations. They sought not only to defend the expansive procedural status that Vladimirov had articulated, but to validate and guarantee the expert's authority in law. For these physicians, the quest for corporate rights meant carving out a sphere of autonomy and influence within state institutions that was impregnable to state interference or the vagaries of judicial officials.

While physicians spoke in one voice on the issue of expert status, jurists were more divided. Physicians' campaigns to secure a judge-like status and Vladimirov's model of expertise met with little resistance from the legal camp.<sup>133</sup> To be sure, jurists at this time did not have a national organization as physicians did, although the 1870s onward witnessed the emergence of local juridical societies attached to the legal faculties of universities.<sup>134</sup> Their views covered the full gamut of opinion: from prominent legal scholar S.I. Barshev, who viewed the expert as a regular witness (who derived his authority from the state, rather than a special knowledge base)<sup>135</sup>—to eminent jurist and Senator A.F. Koni, who steadfastly supported Vladimirov's views and promoted the idea of the expert as scientific judge.<sup>136</sup> In legal writings there was everything in between. Moreover, jurists' views on expertise did not correspond with attitudes towards other contested aspects of the reform, such as the jury.<sup>137</sup> Instead, they more closely aligned with one's views on the value and promise of contemporary medical knowledge, and particularly, the latest psychological/biological explanations of human behavior.<sup>138</sup> Those who rejected the extremes of Vladimirov's views often cited the readily observable fact that physicians frequently disagreed, which, in turn, reflected the lack of perfection of medical knowledge.<sup>139</sup>

Regardless of their viewpoint, legal practitioners and scholars all addressed Vladimirov's views—in textbook chapters, monographs, articles, or speeches—as a common reference point, and set

their own positions against his. Those who spoke on this topic were typically prominent jurist-scholars, engaged in governmental commissions reviewing the reform, and/or practicing defense lawyers.<sup>140</sup> In general, these jurists supported Vladimirov's views in spirit (that the medical expert deserved special authority) if not in the concrete proposals (making medical conclusions mandatory and decisive, or the inscription of physician's expanded authority in law).<sup>141</sup>

The most stringent opposition to the expansive view of medical expertise, and Vladimirov in particular, did not come from jurists, but publicist Viktor Fuks. Best known as a vocal critic of the jury, Fuks also was the author of a broadside against Vladimirov and physician-experts in general. Fuks claimed that his "long overdue" critique aimed to fill in for what he called a "sixteen year silence in the legal community" regarding Vladimirov.<sup>142</sup>

Fuks' attack on Vladimirov and experts was part of his more general attack on the judicial reform. In the eyes of Fuks, the main problem was that the courts (and judicial actors therein) were not accountable to the state or subject to the restraints of law.<sup>143</sup> "The separation of the court from the state organism violated the very authority of state power, the steadfastness of which was from time immemorial in Russia the basis of general order and public welfare."<sup>144</sup> This fundamental flaw reproduced itself in every element of the new system, including the separation of courts from administrative mechanisms, the independence of judicial decisions based on "inner conviction," the control of court by "public opinion" (the jury), and the absence of any rules of evidence. For Fuks, anything that smacked of discretionary action or circumvented the dictates of law was suspect; this included the physician-expert.

Fuks rejected the idea that the physician's knowledge base was "anything special." Like Barshev—who two decades earlier also had argued for a reduction of the physician's role—Fuks referred back to the spate of sensational "misguided verdicts" involving physicians in the first years of the courts.<sup>145</sup> He refused to privilege medical expertise. "There is no reason to rank experts," he wrote. "All should be the same before the law."<sup>146</sup> Not surprisingly, Fuks

also rejected the special rights and status that physicians and Vladimirov had promoted. "In order to furnish the expert with the opportunity to get the materials that are necessary for him, there is no need to dress him in the judge's robe, and seat him next to the jury on the same bench, in the interest of truth."<sup>147</sup> In the end, he proposed that physicians should be more firmly controlled and adopt "a correct view of their task and rules by which they should be guided."<sup>148</sup>

The interest in regularizing the judicial process was not confined to the liberal end of the political spectrum—what varied was how this regularization was to take place. In this regard, Fuks presented an alternative vision to those advocates of expertise for improving the courts. In several respects, Fuks and Vladimirov—while political opposites—shared similar goals. Both sought to regularize the judicial process, and eliminate arbitrary actions; both wanted to introduce sources of overarching authority to remedy these problems; and both sought to secure and legitimate that authority by turning to the traditional source of validation, formal law. For the Vladimirov camp, this source of authority was science as interpreted by experts, who would shape the course of adjudication, and rationalize the procedures that lay at the heart of the rule of law ideal. This approach sought greater discretion for physicians. For Fuks, the solution involved reasserting the role of the state through law, and limiting the opportunities for discretionary action among physicians in particular. As the turn of the century approached, Russian activists, academics, and practitioners presented competing visions for improving the function of the new judicial system, and shaping its future course. The role of the physician—either in exalted or diminished form—was essential to each of these visions. As the early optimism surrounding the judicial reform was replaced by ongoing modification and criticism—members of the educated public turned to other sources of authority (beyond the legal institutions in their own right) as a corrective and guiding hand: while some, like Fuks, sought to resurrect the traditional role of the state, emerging professional groups turned to the new legal form and embodiment of scientific authority: the expert.

## LEGACY

As with many late imperial debates, those over the physician's legal status did not result in legal changes.<sup>149</sup> As one physician observed in 1893, while the view of expert as judge was the "most correct," the consequences flowing from this view are "still not great."<sup>150</sup> Indeed there was not even agreement on what the final informal consensus was regarding the status issue. Was the physician a judge of facts, or was he, like A.F. Koni regretted, regarded merely as a witness?<sup>151</sup> Although the debates over status did not result in concrete legislative changes, Vladimirov's ideas and the ensuing debate left an even more pervasive legacy. First, it provided firm ground on which to cultivate a new body of imported medical explanations of deviance and their institutional enactments which implied a large institutional role for physicians, a role which dovetailed with the native view of the physician-expert's expansive role. Second, the debates regarding expert status inspired joint efforts and meetings between jurists and physicians in the 1890s.<sup>152</sup> In these efforts, physicians and jurists jointly tried to resolve the expert-status issue and, more broadly, explored new institutional forms to manage problems of social order.<sup>153</sup> In the process, they identified themselves as the new specialized overseers of a domain that had previously been the monopoly of the autocrat and central government.

The reception of imported ideas took place in a complex environment. However, the longstanding and deeply-rooted view of the medical expert's expansive authority in Russian history has been overlooked by historians. This uniquely Russian tradition was culturally receptive to newly fashionable, imported medical explanations of criminality. In *fin-de-siècle* Europe biological explanations of criminality and deviance took their most extreme and deterministic form in the views of their founder, Italian criminologist Cesare Lombroso.<sup>154</sup> Laura Englestein has shown that Russian jurists and physicians resisted the social implications of Lombrosian ideas.<sup>155</sup> However, at the same time they retained a belief in the *lichnost'* (individuality) of the criminal, as well as the

institutional and professional interventions this depiction mandated, which together implied a guiding role for the physician.<sup>156</sup> That is, while Russian physicians rejected biological explanations for the cause of crime, they welcomed these views as justification for reform. For example, Kiev forensic physician E.F. Bellin defended the need to salvage criminal anthropology in spite of its flaws, stating that “without problems—it is not science.” Advocating reform of the state’s system of social management, Bellin defended the rationalist approach to social problems that these ideas implied. “Having proven the insubstantiality of some of its separate conclusions,” he argued, “[critics] rush to a conclusion about the insubstantiality of the entire medical study of the criminal, forgetting that the new direction, its methods—objective and scientific—offer very much for the clarification of the most difficult, complex questions.”<sup>157</sup>

The link between Vladimirov and the reception of these ideas took shape in the work of social activist and jurist Dmitri A. Dril’.<sup>158</sup> Dril’'s views on criminality were not eagerly received in Russian law faculties, but Vladimirov greeted them enthusiastically and served as Dril’'s receptive and willing mentor. They shared an approach and ethos that secured a strong place for medicine in the traditional legal arena.

Dril’'s professional career embodied the convergence between medicine and law. After graduating from the Moscow legal faculty, and having passed his master’s exam in criminal law, Dril’ entered the medical faculty. Sent abroad, he was strongly influenced by the new Italian school of thought in criminal law. When Dril’ returned to submit his dissertation for the degree of Master (*magistr*) of Law at Moscow University, his work, “About the Juvenile Criminal,” was rejected on the basis of subject and approach.<sup>159</sup> Dril’'s conclusions about the punishment of juvenile criminals were based on the “latest anthropology,” and drew heavily from material in the psychology and psychophysiology of the criminal. The Moscow University legal faculty rejected his work because it “very closely related to medicine.” This rebuff is not surprising in light of the fact that on this faculty was S.I. Barshev, the longstanding opponent of medical explanations of behavior since the 1840s and an

outspoken opponent of privileged expert status. For the opposite reason Vladimirov, who had long advocated the interdependence of medicine and law, invited Dril' to defend his thesis at Kharkov University, and agreed to serve on his committee. This crossing of paths, between Vladimirov and Dril', was neither accidental nor lacking in significance. By enabling Dril' to pursue his academic career, Vladimirov's ideas found a new life in Dril''s attempt to integrate medicine more centrally into law in order to improve the functioning of the judicial system. Fully familiar and supportive of such an "interdisciplinary" approach, introduced and developed by one of their own, the Kharkov medical and legal communities warmly welcomed the work of Dril'. In 1884, Dril' defended his dissertation at the Kharkov legal faculty, where the committee for his defense ("dispute") consisted of members of both the legal and medical faculties.<sup>160</sup> Dril' and the ideas he promoted remained a bridge between medicine and law, and he was a key participant in the joint meetings that formed in the 1890s.

The second legacy of the debate over expert status was the forging of a new partnership between physicians and jurists. Jurists had been divided on the question of expert status, but demonstrated more unity with physicians than they did amongst themselves in attempting to defend and extend medical expertise.

The impetus for these joint meetings began in medical circles but was realized in the legal camp. The immediate fillip, at least in Moscow, came in the form of a speech presented by jurist A.V. Pogozhev, at the meeting of the Moscow Juridical Society in 1891, "Medical Science and Judicial Practice."<sup>161</sup> Having closely followed physicians' debates at the Second, Third, and Fourth Pirogov Congresses, as well as many *zemstvo* medical congresses, Pogozhev recounted the growing chorus among physicians for legal changes in their status and other medico-legal issues.<sup>162</sup> Listing their concerns, he repeated one physician's charge that "we will not stand for this situation any longer."<sup>163</sup> Pogozhev seized upon physicians' suggestion of a special commission of jurists and physicians for the discussion of an array of medical-legal questions, and presented this proposal to his colleagues at the Moscow Juridical Society.

Pogozhev called for real change and "movement" on issues that

had previously been theoretical, and left in the hands of government. He argued that the best way to achieve their common interests was through their combined strength. "Such a commission would supply the government with highly valuable factual material in many medico-legal questions," Pogozhev explained. He added that "the vast mass of facts and the entire series of guiding thoughts of specialists must conclusively convince the government and all of Russian society that the situation of forensic-medical *ekspertiza* in Russia, with each day becomes more and more impossible."<sup>164</sup> But above all the emphasis was on the necessity of a partnership in approaching these issues. To maximize effectiveness in guiding the government and reform, a united front was necessary. "There is no doubt that medical science and jurisprudence must always walk hand in hand—not in any way displaying disagreement between them." This was a call for change, because as he observed, "[u]nfortunately this is far from what happens in life."<sup>165</sup> The status debates of the earlier decades served as the precursor and impetus for bringing jurists and physicians together to join forces, in their effort to resolve issues of expertise and reform state institutions in the process—rather than pursue separate group interests, or leave such questions to the state.

Pogozhev's proposal came to fruition during the first three years of the 1890s in a flurry of joint meetings and unified efforts between jurists and physicians.<sup>166</sup> The Moscow Medical-Legal Commission met in 1891; in St. Petersburg, the Joint Legal-Psychiatric Commission convened in 1893, and later in the same year, jurists participated at the Fifth Congress of the Pirogov Society of Physicians. Some of the legal participants in these meetings had, in the previous decades, participated in governmental commissions for examining the problems with judicial reform.<sup>167</sup> They brought to these joint meetings a full awareness of the flaws of the reform, and urged physicians to explore alternative institutional approaches. This perspective drew upon Vladimirov's intellectual legacy in the form of D.A. Dril', who was a key participant at all of these meetings.<sup>168</sup> Together, they explored ways to transform the state's institutions for preserving social order (criminal justice and penal institutions) along more rational, scientific lines, inspired by the



imported ideas of criminal anthropology, yet consistent with the native tradition of asserting a guiding role for medical expertise. At the same time, their proposals aimed at protecting the new legal institutions.

At these meetings, calls for the expansion of the medical-expert's legal role took their most extreme form in the case of psychiatric expertise. By the end of the century, forensic psychiatrists called for judicial-administrative reform in the name of both social welfare and scientific interests. Prominent psychiatrists argued that the state's judicial and penal institutions should be reorganized on the basis of a more pervasive and influential role for medical expertise, and forensic-psychiatry in particular. This expanded role, prophylactic in its ideal form, was to include the forensic-psychiatric examination of every criminal offender—the “criminal class”—at each stage of judicial procedure and within penal institutions. However, with regard to the form of this institutional reorganization, Russian forensic psychiatrists—in sharp contrast to their European counterparts—rejected the idea of any institution or bureau of expertise that was either centralized or vested with autonomous authority. The Commission's conclusions reflected the longstanding priority of extending expertise in order to safeguard the reformed judicial system. Members insisted without exception that the expansion and development of forensic medical expertise take place at the local level, and in close conjunction with local, albeit transformed, judicial institutions.<sup>169</sup>

The call for a more pervasive integration of psychiatric expertise extended beyond these meetings. “At present,” one physician wrote, “psychiatrist-experts are completely separated from the [judicial] process itself,” not being included “in its flesh and blood.”<sup>170</sup> The debate and stakes for expertise had now moved well beyond the status issue that occupied earlier debate. Indeed, by the 1890s, in this same physician's view, to call a physician a witness was a “crude mistake.”<sup>171</sup>

How far were jurists and physicians willing to go to improve and protect the new judicial institutions? How far were Russian professionals willing to push their arguments for the expansion of expertise? Not surprisingly, it was Vladimirov's protégé Dril' who

promoted the most expansive form of authority. He tested the boundaries at an 1891 meeting of the Moscow Juridical Society, attended also by physicians, which was devoted to the question of the necessity to revise the forensic-medical legislation.<sup>172</sup> Support for a joint mission by physicians and jurists came in response to Dril's proposal that medical testimony, especially in questions of the defendant's criminal responsibility, be considered obligatory for the judge.

At first blush, the premise of Dril's suggestions was no different than that which statute defined and medico-legal discussions confirmed: "When technical questions arise in a case, the court separates them out from the general question and transfers them to the resolution of technical specialists."<sup>173</sup> In a controversial statement he argued that "[i]f the law recognizes *sumasshestvie* [insanity as a basis of non-responsibility], then the physician, having pronounced the accused mentally ill—in accordance with that law—by himself eliminates the question of responsibility [*vmenenie*] in each given case. Subsequently there is no need to transfer this question back to the decision of jurists." In the question of responsibility, he continued, "the opinion of physicians should be mandatory for the court."<sup>174</sup> Dril's proposal reflected Vladimirov's original 1870 arguments for establishing the physician's procedural role as a "scientific judge."<sup>175</sup> Such an approach was informed as much by Russian tradition as by Western ideas.

Despite continuity with earlier approaches, both jurists and physicians rebuffed Dril's proposal because it threatened the cohesion and partnership that both groups sought to strengthen in order to achieve their mutual goals. A.M. Fal'kovskii not only rejected the excesses of Dril's proposal, he returned to the stark letter of the law that had, up to that point, been interpreted generously in discussions of expert status.

Dril' proposes a completely new court—a court of doctors. Such a court is not only impossible, but it will not be and cannot be—as doctors can only be "knowledgeable people" [*svedushchie liudi*], and not judges.... All that society has accomplished at the present time leads to the fact that we, under

the exercise of justice, must act by joint strength and means, and not ask ourselves the question that was asked by Dril', about the establishment of a court of doctors.<sup>176</sup>

This view was shared by medical participants. Physician P.Ia. Rozenbakh graciously acknowledged that Dril's proposal was "of course, very flattering for physicians," but that he, like another medical participant, objected in principle.

There is no doubt that at the present time in the study of crime and punishment, and moreover non-responsibility, physicians will play a great role, and that if with time, reforms of the judicial proceedings will be conducted under the influence of these new studies ... psychiatrists will participate actively.... But now we are in a transitional period, when old understandings are being shaken and the new ones are still not worked out. Neither moralists nor physicians have come to a decisive conclusion yet—whether or not the born criminal is an ill subject or not. It is precisely in such cases, speaking about such vague questions, which are bordered by medicine and morality, that irreconcilable arguments arise between separate experts on one side and between experts and jurists on the other. But no matter how difficult the situation of who must decide that vague question in concrete cases—if the court does, it can justify itself by the fact that [this responsibility] was laid upon it by social strata [*obshchestvennyi stroi*]. Let the physician be limited to the role of investigator [*issledovatel'*] and adviser.<sup>177</sup>

These views, supported by other participants, underscore the reformers' perspective that while professional expertise was essential to ensure and direct the proper course of justice, this type of guidance was to be conducted in accordance with the new judicial institutions—and most importantly, in conjunction with legal professionals, with whom physicians sought the individual protections and disciplinary autonomy that, at least in theory, the rule of law could provide.<sup>178</sup> Above all, participants saw the necessity of pre-

serving their collective objectives and strength in the face of separate group interests.

Physicians and jurists entered the turn of the century in agreement on joint goals and a firm partnership. A succinct expression of this predominant Russian viewpoint was voiced at a subsequent meeting (1898) of the same Moscow Juridical Society. Legal official E.M. Barantsevich's essay on the legal and practical situation of forensic medicine, based on his twenty-five year experience as a judicial investigator, sums up the broad political and social objectives which animated late nineteenth-century Russian debates over medical expertise. "Let the physician and the jurist by means of joint strength support the ideals of service to society, love of humanity, legality and respect of individuality [*lichnost*']."<sup>179</sup>

## CONCLUSION

By the end of the 1880s, different visions coexisted in Russia regarding the appropriate direction and shape that legality should take; the role of the expert was integral to these competing visions. It has become standard for historians to describe the tension surrounding the judicial reform as taking place at the level of high politics, and consisting of two antagonistic conceptions of a legal order: those who supported a "rule of law" versus those supporters of state interests and the discretionary power of state administrators.<sup>180</sup> The debate over expert status illustrates how responses to the judicial reform were more complex, and practitioners of medicine and law produced alternative visions of legality, that they deemed best-suited to Russian needs, and in direct response to the problems that surrounded the reform's implementation.

When the new courts opened in 1866, the physician's role in the judicial system was still an administrative function; by the 1890s, the medical expert represented an independent site of authority within state institutions and society at large. One measure of the

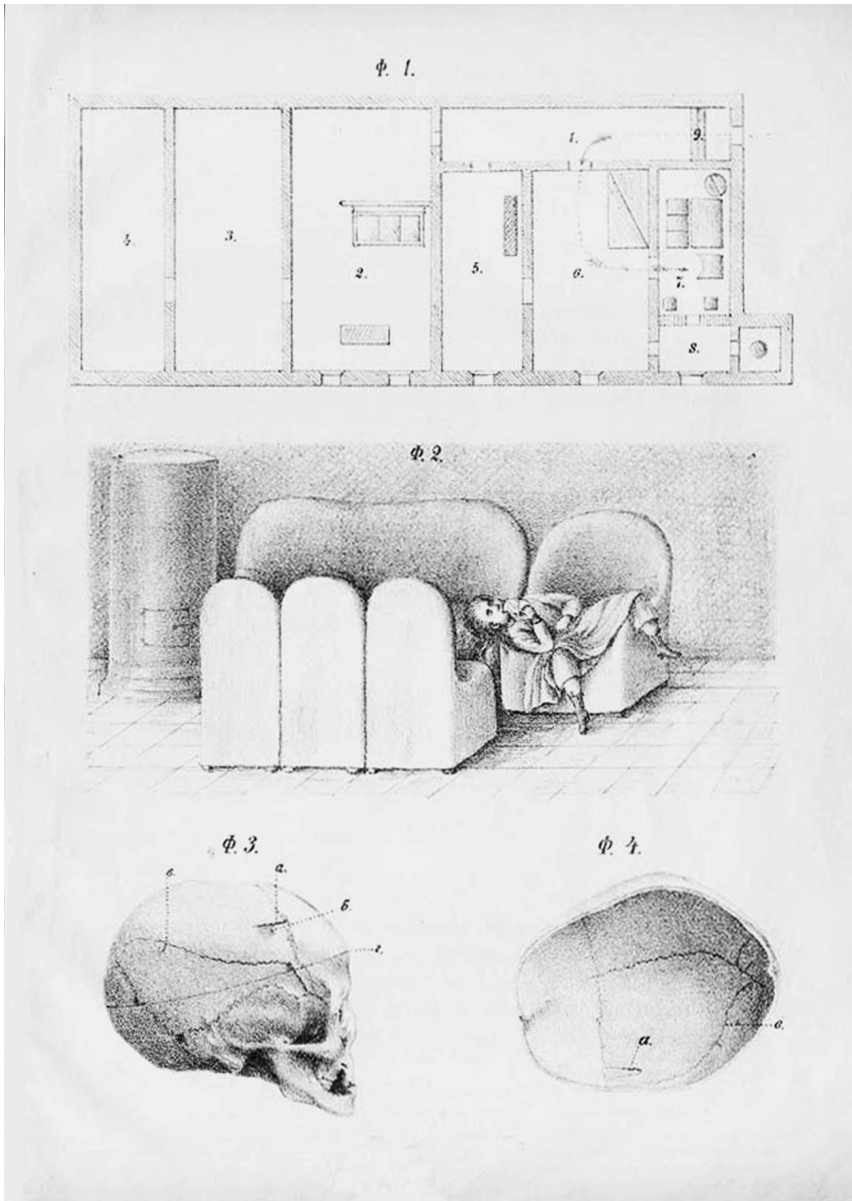
medical expert's new public identity is the increasing appearance of this figure, and the psychiatric explanations of behavior that he promoted, in contemporary works of fiction in precisely this period. Dostoevsky ended his novel, *The Devils*, with a statement by physicians who performed a forensic dissection on a suicide victim, and "absolutely and positively ruled out insanity."<sup>181</sup> Writer and journalist N.S. Leskov not only covered sensational criminal trials that involved psychiatric experts, the trials themselves—and the psychiatric categories introduced therein—became the subject matter of his fiction.<sup>182</sup> Tolstoy had his fictional assistant procurator, while addressing the public and the jury, include in his speech "all the latest catch-phrases then in vogue in his set, everything that then was and still is accepted as the last word in scientific wisdom ... heredity and congenital criminality, Lombroso and Tarde...." He also engaged his defense counsel and assistant procurator in an argument over the relationship between heredity and criminality, with the latter describing the defendant as "a degenerate personality," who in all likelihood "carries in her the germs of criminality."<sup>183</sup>

However, physicians were not alone in traveling (or charting) this path. Medical practitioners and officials forged this new identity in conjunction with jurists—within and outside of the state apparatus—who shared a common interest in extending the role of science (and the medical expert) within the new judicial system. Moreover, it was largely through the efforts of the legal camp that physicians' occupational objectives were reinforced in practice (by the rulings of Cassation judges) and theory (by the initiation of law professor and defense lawyer Leonid Vladimirov). Much of the impetus for these shared interests emerged out of the early dissatisfactions with the judicial reform. As the judicial reform failed to live up to its promise in the eyes of contemporaries—and the judicial institutions increasingly came under governmental scrutiny and modification by the 1870s—medical and legal activists redirected their hopes for its improvement and future course to that other great source of promise in the reform era, science.

By the final decade of the century, not only did the physician

identify himself as an “expert”—but the concept of “expert” became identified with the physician. After a quarter century of efforts to redefine the physician’s formerly administrative role as an independent, judge-like expert, medicine and expertise had become virtually fused. Physicians felt a sense of propriety over the term and role of “expert.”<sup>184</sup> This is clear in the comments of physician Uspenskii, a docent at the Military-Medical Academy in St. Petersburg, in which he denied calligraphers the title of expert for their lack of medical-scientific grounding. According to Uspenskii, “[e]xperts in the area of handwriting must be fundamentally familiar with the physiology and pathology of the nervous-muscular writing apparatus, in order for their conclusions to inspire a sufficient degree of confidence in the court and public. But one can more likely find people with such knowledge among physicians, than calligraphers.”<sup>185</sup>

Besides a common faith in science and its application to legal process, physicians shared a broader professional objective with jurists. It is common practice for historians to point out that the professionalization process in Russia overlapped with the political objectives of liberal, educated society in general, and was unique insofar as it incorporated the quest for “civil rights” and legal protections of individual (and group) autonomy. However, these accounts disregard the fact that such legal safeguards to professional autonomy were contingent on the success and security of the new judicial system, in which both physicians and jurists worked. Based on their own personal and practical experience, physicians and jurists were not only aware firsthand of the new system’s flaws, they were invested more broadly—on a political and professional level—in its success and longevity. Thus, the expert’s status was the site of multiple coinciding agendas. On the one hand, to remedy the practical problems of implementation and bolster their public authority, physicians sought to clarify and expand their rights in the judicial system. Their demands represented a continuity with the pre-reform period, and were in keeping with the privileged status, social influence, and discretionary authority they had known under inquisitorial procedure. On the other hand, these occupational interests dovetailed with



*These forensic-medical drawings were prepared for the celebrated case of the murder of Sarra Bekker, fictionalized by nineteenth-century writer N.S. Leskov.*

Courtesy of the Russian National Library, St. Petersburg.

reformers' efforts to regularize and improve the judicial process against increasing criticism that continued up through the 1880s, and governmental interference.

In sum, the turn to medical expertise represents a uniquely Russian approach to implementing the rule-of-law ideal. It reflects the peculiarities of the late imperial context both in terms of the political and practical tensions that emerged from the introduction of the reform, and currents of social thought/faith in science that motivated reformers, academic specialists, and more radical groups. Because of the specific stakes attached to the independence of medical authority and the new judicial institutions in autocratic Russia, the issue of expert status resonated with physicians and jurists in a way it did not in other countries. The debate over and campaign to elevate and expand the physician's legal role set the Russians apart in a comparative European context.<sup>186</sup>

Rather than drive a wedge between physicians and jurists, the debates over the physician's role, from implementation onward, pulled the two groups together. In this way, physicians and jurists reinvigorated that original "partnership" established under Peter I, to serve his new judicial-administrative system under his overarching guidance and benevolent wisdom. And like Peter I, physicians and jurists—two centuries later—also sought to reform the state system based on prevailing, albeit different notions of rationality. However, notwithstanding the parallels and continuities with the earlier incarnation of their occupational roles and relationship, the 1890s variant was distinct in one clear way. As before, physicians and jurists worked cooperatively to better serve the goals of justice and social welfare, but by the close of the nineteenth century, they did this by positing themselves (and their specialized expertise) as the new overseers of social order and visionaries of reform—carving out a space in what had previously been the monopoly of the autocrat. At the turn of the century, medical and legal reformers jointly sought to enhance their own occupational influence, independence, and authority together with their efforts to improve and transform the state system.



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## Conclusion

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As the Russian state was reforming institutions and social order in the late imperial period, Russian professionals were revising their conceptions of criminality and legal responsibility in an equally dramatic and related manner. Entering the twentieth century physicians joined hands with jurists in order to “rationalize” the state’s legal institutions and system of social management in the name of specialized knowledge and modern technique. Driven by common objectives, prominent members of these groups decided that professional authority could be strengthened in league with one another, in their joint efforts to introduce medical expertise—and psychiatric in particular—more pervasively throughout state institutions. While the medical conceptualization of social deviance—and the social-administrative implications of this redefinition—generated intellectual, cultural, and political debates in both Russia and Western countries, these debates necessarily took a different cast in the Russian context. In both the United States and Western Europe, forensic psychiatrists engaged in bitter jurisdictional disputes with members of well-established legal professions, within the context of long-standing judicial institutions. In Russia, by contrast, the emergent medical and legal professions—both critical of the autocracy and the state institutions in which they worked—joined forces in their attempts to fundamentally transform the autocratic system and its institutions, based on claims of technical expertise and scientific rationality.

Under these shared occupational objectives, which had roots in Peter’s eighteenth-century administrative state, professional iden-

tity was associated with the state rather than opposed to or separate from it. However, this close connection between Russian professionals and the state was not altogether anomalous. Rather, it was one variation on the spectrum of European experience. The incorporation of occupational groups in the state was part and parcel of eighteenth-century European models of governance, which Peter I also had borrowed, particularly the notions of rational organizations and administrative tutelage of German cameralism. Centralized states enlisted occupational groups in their administrative apparatus, including the establishment and “policing” of public order and social welfare. Within these general parameters, there was no single or dominant European model. Professional development in Continental Europe was a warp and weft of corporate groups and state regulation. Guild-like bodies evolved along an uneven path, intersected from above by periods of state intervention and regulation (varying in extent and duration). The resulting, overall pattern varied from country to country and was shaped by local political circumstances. Notwithstanding these variations, one can safely say that the state played a large role in the evolution of the European professions, through the process of bureaucratic regulation, state-controlled credentialing and education, *de jure* monopolies, regulation of fees, bureaucratic disciplining, and public employment.<sup>1</sup>

What distinguished the imperial Russian case is that it exhibited all of these characteristics, all at once, across the imperial period. Moreover, there were no guilds as starting points. The medical occupation, as a social group, was an eighteenth-century creation of the state, and in turn, the state administration blanketed the entire medical occupation.<sup>2</sup> Thus although Russians borrowed their medical-administrative institutions from foreign models, the comparative medical actors are not identical despite nominal similarity. In Germany, the “forensic physician” occupied a distinct occupational service post (separate from other police and therapeutic duties), and therefore formed a subgroup of the medical civil service, and an even smaller subset of the occupation as a whole. In France, any freely practicing physician licensed by the

state could be invited to serve the courts, and it was his choice whether to accept or not. In Russia, by contrast, all medical functions (forensic, police, and therapeutic) were combined in one and the same state physician who was legally obliged to perform them all. This arrangement reflected the autocracy's approach to the social and material realities it faced: the effort to structure and manage society through legal-administrative categories, and a chronic dearth of personnel to administer its vast territory. Consequently, all Russian physicians were, in theory, forensic physicians. As in the rest of Continental Europe, which shared the same tradition of civil law, medical testimony was a mandatory element of legal procedure; however, in Russia alone, forensic-medical practice was diffused throughout the entire medical profession. As a result, forensic practice and issues shaped its outlook in a way that was unique to Russia.

In the absence of a tradition of guilds in the pre-Petrine era, physicians in the first half of the nineteenth century did not identify with separate group interests. Rather, physicians inside and outside of government viewed their interests as intertwined with the institutions in which they worked, the social goals to which these state institutions were geared (justice, and the patronage of public welfare), and the legal officials with whom they worked in these institutions. All of these factors contributed to physicians' distinctive outlook in a comparative European context, and the manner in which physicians fashioned their professional identity in the post-reform period.

Russian physicians took a practical approach towards professional autonomy: the way to get autonomy from the state was to work within it. In the absence of other political or civic channels for physicians to secure their collective interests, they turned to the same tools and mechanisms to refashion their identity that the state used to define it. They sought to change and manipulate procedural rules and administrative relationships. They employed these tactics as their interests evolved and intertwined across the nineteenth century. Beginning with attempts to secure basic material needs and discretionary authority, they moved to bolster the

new judicial institutions and rule of law in the century's latter quarter. This approach to gaining autonomy characterized the efforts of elite medical officials who participated with legal officials in drafting the judicial reform at the middle of the century. It also characterized subsequent, broader-based efforts to expand the physician's role and autonomy in the reformed judicial system, and secure it with the individual "rights" that the reform created. These efforts shaped a broader professional and political mission in the post-reform period. Legal and medical activists joined forces to extend medical expertise in order to "rationalize," improve, and thereby secure the reformed legal edifice. This alone could guarantee the inviolable rights that were fundamental to the autonomous, civic exercise of professional authority. Physicians found it necessary to take over the state-controlled definition of their field and change its course in order to transform the state and not merely, as in the professions of Western Europe and the United States, to gain autonomy from it.

In their efforts to carve out a sphere of autonomy, physicians recast their role in the state apparatus from functionary to independent scientific expert. In doing so, physicians rejected the state's traditional system of allocating authority and ascribing social identity through its system of titles, ranks, and privilege—one of the bulwarks of the autocratic system. In drawing this conclusion, I take issue with other scholars who have argued that social groups, by virtue of their integration within the state, were disabled from constructing new social identities in Russia, without a concept of a "neutral space" between "state" and "society."<sup>3</sup> I also challenge the accepted interpretation of the quest for autonomy as an emulation of the "free professions" in its idealized form, as a twentieth-century sociological construct, based on Anglo-American experience. I argue that physicians sought to gain autonomy and redefine their role from within the state (two interrelated processes), through an ongoing series of procedural and administrative adjustments to existing social and political conditions.

The outlook of professional groups was also shaped by their interaction with the institutions in which they worked. The tensions

surrounding the reformed judicial system exemplified a characteristic of Russian social development that Alfred Rieber has described under the apt name of “sedimentary society.” The reformed judicial system was itself a composite of older, traditional structures overlaid by new institutions that were based on different and conflicting principles. Several conditions contributed to this layered effect, and characterized a process of reform and institutional innovation that was peculiar to Imperial Russia. These aspects have to do with the mentality of bureaucrats and professionals.

Russian institutional innovation and reform have always involved the selective and eclectic process of picking and choosing foreign models. Imperial Russia’s educated elite possessed a unique combination of technical ability (trained in French and German languages) and cultural openness to adapt forms and techniques from various Western models, in virtually all areas of knowledge production, to native traditions and imperatives. This process was a fundamental characteristic of Russian legal development, and shaped the institutional and procedural setting in which physicians worked. The introduction of the English jury trial—with its package of liberal institutions, procedures, and principles—was layered on top of the unaltered framework of the inquisitorial system (in the form of the pre-trial investigation phase) and the social grid of administrative-service positions. This arrangement directly affected the physicians, in their interaction with the legal actors, as well as producing dissonance (and confusion) with regard to their role in the new courts, and their public identity. Was the physician, when called to testify at jury trials, an independent expert performing a civic duty, and serving the new principles of the reform? Or did he remain, as legal codes and the preliminary investigation still implied, a state functionary serving a bureaucratic function and administrative interests?

These overlays were not limited to the reformed judicial procedure; they were institutional and intellectual as well, contributing to the speckled effect. The medical-administrative hierarchy, in which state physicians worked, reflected this trait of institutional reform. Late eighteenth-century officials imported Prussia’s three-

tiered system of medical administration, but left behind any change in the physician's official status. Instead, these innovations overlaid Peter's preexisting social map of legal-ascriptive categories, service titles, ranks, and obligations. Physicians, however, were not passive bystanders in this process. Medical practitioners and academics also drew continually and selectively from European sources, borrowing new intellectual categories and juxtaposing them against older, legally ingrained forms. This process involved medical concepts that physicians employed in their forensic-psychiatric testimony as well as the terms with which they redefined their forensic duty and self-identity. While the rules for legal responsibility included antiquated medical categories, the physicians incorporated into their public testimony newly imported conceptions of mental disorder. They included a broader array of social behaviors and required specialized expertise to identify. They also implied a rationale for extending the role of medical expertise in state institutions, and by so doing, transforming the state system. Physicians also produced a mixed effect when redefining their identity in state institutions. Medical practitioners extracted the social category of "expert" from foreign texts, and layered it on top of the state-defined, administrative divisions within their occupation. Physicians applied this term in relation to indigenous state structures, inter-occupational relationships, and the emerging phenomenon of specialism which, in the eyes of some physicians at mid-century, threatened the institutionalized authority of state-service physicians. This process exposed the fault lines within the occupation and demonstrates that the medical profession was not a homogeneous social group.

The continuity of the bureaucracy also contributed to the partial character of reforms. Despite the presence of many new people in governmental ministries in the 1860s, the bureaucracy also contained holdovers from the Nicholaevan period. The retention of these officials reflected a strong personal loyalty of Alexander II toward his father's servitors, which was itself a vestige of traditional autocratic politics based on clientele networks. These older bureaucrats were not interested in overturning all elements of the

older system, and this reluctance impeded the passage of unadulterated reforms. The “mixed” nature of the judicial reform, and the deliberate retention of physicians’ traditional administrative identity, were also a result of this characteristic of the bureaucracy.

Physicians entered the post-reform period within this legacy of overlapping and contradictory elements in the intellectual, institutional, and social dimensions of their work. The tension between the different “layers” spurred a cultural and political debate over the appropriate direction of reform. Yet the role of the expert was central to both visions of either amplifying or deflating the physician’s authority.

Redefining physicians’ role and identity under the judicial reform was not a simple or uncontested matter. Through the complexity of this process, the public sphere was enlarged. The attachment of Russian occupational groups to the state apparatus did not hem in their open exchange of ideas on the subject, nor constrain the emergence of a civic arena in which professional authority would play a foundational role. On the contrary, the many sites of discussion and contestation enlarged the scope for the development and circulation of political ideas. In the post-reform period, the procedural context and direction of reform was in flux. In the working out of the reform, the question of the medical expert’s status became enmeshed with different policy positions towards the reform, and the political stakes of the two topics likewise intertwined. The multivalent issue of the physician’s appropriate role and authority under the reform cut across a broad swath of social and political issues, and engaged a diverse range of participants. By pulling together this diversity of social actors, from various corners of officialdom and society, the process consequently expanded the bounds of public debate.

The debate over expert status revealed a convergence of issues and ideas, some of which had roots in the pre-reform period. Government officials and academic scholars, pre-reform servitors and newly emergent defense lawyers, public spectators and publicists, all together entered the debate over competing visions of legality and the physician’s role in court. The reform era’s *glas-*

*nost'* and emergence of a mass press in the 1860s facilitated the movement of ideas between these groups, including new conceptions of the physician as an independent "scientific expert." Articles about the expert question appeared in a variety of political forums: private and daily newspapers, "thick journals," the professional press, official government bulletins, and other forums employed by physicians and jurists, such as scholarly monographs and textbooks, public lectures (redistributed as pamphlets), and professional association meetings. These conduits, combined with the political stakes attached to the physician's role, opened the field of discussion to the wider public. They generated vibrant communities of argumentation, as well as broad social connections and united fronts.

One thread was philosophical/ideological. Debate over physicians' deterministic explanations of behavior was rooted in a pre-reform controversy surrounding medical views which anchored the cause and locus of human action in somatic phenomena. This trend challenged the Orthodox notion of free will and hence had political resonance under the Nicholaevan doctrine of Orthodoxy, Autocracy, Nationality. Opponents of physicians' views in the 1840s carried the same arguments into the post-reform period, where they became absorbed under the popular debate over expert status. For these critics, the ideological rejection of physicians' theories of behavior and responsibility underlay and fueled their rejection of the medical expert's authority under the new courts.

A second thread was bureaucratic/political. The issue of expert status engaged the government's top officials, representing a variety of political viewpoints. The question was rooted in the government's ongoing efforts, through a decades-long series of investigative commissions, to correct the perceived flaws of the judicial reform. The focus was the preliminary investigation. As a pre-reform holdover it contradicted the reform's new judicial principles, such as due process and separation of powers, that were essential to the rule of law. For some legal officials and prominent jurists, due process entailed making medical expertise more accessible to defendants in the pre-trial phase of proceedings, where it



remained the exclusive prerogative of the state's prosecutorial arm. By the century's final decades, members of these commissions, which included prominent jurists, became leading voices in the debate over expert status. They sought to consult physicians on the matter of medical expertise, and initiated new interprofessional forums to explore the question. Officials with opposing political interests also publicized their views about medical experts. Most notably, the powerful Minister of Internal Affairs Valuev turned to the press to voice his objections to physicians' independence under the new courts.

Public reaction to the performance of the new courts was a third thread in the debate over the medical expert. With the opening of trials to the public, and the emergence of mass dailies that covered them, the role of the physician rapidly escalated into a public controversy. While reformers hailed the jury as a liberal institution, jury verdicts (particularly acquittals based on medical testimony) generated public criticism. Physicians became a favorite target. Some liberal newspapers were sympathetic to physicians' psychiatric testimony and the exculpation of the allegedly ill. But a backlash against the physician-expert followed a number of acquittals. Indeed, physicians' definitions of insanity, which rendered a defendant legally not responsible, contributed to acquittals even when guilt was not in question, or the purported insanity not obvious. The medical expert was accused of usurping the role of the jury or else of undermining the autocrat's monopoly over social management. In brief, the medical expert became a lightning rod of public criticism and outrage among both supporters and opponents of the reform.

A fourth and final thread in the debate was professional. The question of expert status drew together different occupations (medicine and law) under a shared set of interests. Jurists and physicians read each others' professional literature. New ideas about the medical expert's status passed fluidly from one group to the other through reviews and cross-referencing. It was through these routes that the more radical views of a Kharkov professor of jurisprudence—positing the physician as judge-like in status—spread

rapidly within the medical occupation and became a touchstone in the debate for the remainder of the imperial period. The public circulation of ideas also shaped the process of legal revision. High-ranking Cassation judges confirmed through their rulings the views of medical expertise—as privileged and exceptional—that medical and legal practitioners promulgated in the periodical press. Professionals shaped their arguments in order to expand the expert's authority in such broad contexts as the national interest (the greater role of science in the courts would bring Russian institutions in line with European powers), or symbols of civilization, or populist ideals (even when the authors were not themselves Populists). To be sure there were shades of disagreement between and within the different occupational groups. While most agreed on the physicians' importance in the new courts, professionals differed in how to implement that privileged medical authority, while preserving the integrity of the new judicial institutions.

Through the convergence of these different threads, a pattern of issues and connections emerged that transcended occupational and state—society divides, and widened the arena for building alliances. Within the debate, however, it is almost impossible to draw a neat line between conservative and liberal positions. Groups aligned themselves more closely according to support or faith in medical theories of behavior and, more broadly, the social promise of science applied to the study of the individual (*lichnost'*) that these theories implied. Alliances were further solidified by the social cross-stitching of new organizational forms. Physicians and jurists initiated joint meetings and proposed interprofessional organizations in order to work out the problem of the medical expert, negotiate different conceptions of legality, and formulate proposals for institutional reform. This widening spiral of debate produced a multiplicity of dialogues, and in the process, the scope of the arguments also increased.

The integration of Russian professionals in the state apparatus did not set them apart from European counterparts, nor did this structural arrangement set Russia on a “special path.” Physicians and jurists, in their debates over the expert's status, enlarged the

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public sphere and played a vital role in shaping the legal edifice that would secure it. Law and (Foucaultian) discipline were not merely joint alternatives to the autocratic state; legal structures and professional identities were mutually constitutive in post-reform Russia. Through the particular confluence of these processes, the forensic psychiatrist emerged in late Imperial Russia as a new center of public authority and emblem of reform in the twilight of the old regime, as initial optimism in the state's "great reforms" was transferred to alternative sources of reform and social oversight. This process, however, also took place in a political context, and it was this context—rather than the particular location of professionals—which prevented this public sphere from developing fully.



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# Notes

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## INTRODUCTION

- 1 In Continental Europe, by the sixteenth century, trial by ordeal was replaced by inquisitorial methods of investigation and proof derived from the learned traditions of Roman and canon law, in which fact-finding was a skilled function. The essential features were that the state did the prosecuting and professional judges did all the adjudicating (rather than jurors). Inquisitorial proceedings were written and secret.
- 2 Forensic medicine (*sudebnaia meditsina*) was both a practical endeavor and an academic discipline. First appearing in Continental literature in 1690, the term “forensic medicine” may be defined—and was understood in the Russian context—as the application of medical information to any aspect of law. In this study, I primarily focus on its application in criminal proceedings. Strictly speaking, the term should be distinguished from broader terms used in foreign literature such as “medical jurisprudence,” which includes in addition the philosophy and science of law as applied to medicine. However, there was no strict usage of the term among contemporaries, and definitions occasionally bled into one another.
- 3 Of the several innovations of the reform, the introduction of trial by jury had the most direct implications for autocratic authority and the physician. While the circuit court was the most prominent post-reform forum in which physicians conducted their forensic obligations, medical practitioners also performed forensic duties at other administrative levels. Forensic-medical practice, including questions of mental competency, was legislatively defined and institutionally organized according to a three-tiered system composed of district and city doctors, the medical section of provincial administrations, and the Medical Council, which operated under the Ministry of Internal Affairs.
- 4 See, for example, Elizabeth A. Hachten, “Science in the Service of Society: Bacteriology, Medicine, and Hygiene in Russia, 1855–1907” (PhD thesis, University of Wisconsin, 1991); and Daniel Todes, “From Radicalism to Scientific Convention: Biological Psychology in Russia from Sechenov to Pavlov” (PhD thesis, University of Pennsylvania, 1981).

- 5 There is general scholarly consensus that the other necessary elements for a civil society include a print culture and the press, universities, institutions of local self-government (*zemstvos*), economic growth, and urbanization. While “necessary,” it remains a matter of debate whether these elements are sufficient, and, it seems to me, whether this question is even germane for analyzing post-reform Russian developments. Recent scholarship has tended to view the confluence of these developments as the emergence of a “civil society” or “public sphere,” terms which historians of Russia borrow from political theorist Jürgen Habermas, and often use interchangeably and with little consensus on their meaning. Moreover, for Habermas (originally, at least) the concept of “public sphere” was rooted in class and capitalism, which makes the adoption of such terms problematic if not obfuscating in the Russian case. See Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: MIT Press, 1989). While the very definition of “civil society” has been subject to much theoretical discussion, the most prominent collection devoted to this topic in the Russian setting adopted the view that Russian “civil society” necessarily consisted of members of the liberal professions and other Russians who stood outside of and distinct from the state. See Edith W. Clowes, Samuel D. Kassow, and James L. West (eds.), *Between Tsar and People: Educated Society and the Quest for Public Identity in Late Imperial Russia* (Princeton: Princeton University Press, 1991). This view is also reproduced in Joseph Bradley, “Subjects into Citizens: Societies, Civil Society, and Autocracy in Tsarist Russia,” *American Historical Review* 107/4 (2002): 1094–123. As this book demonstrates, however, many leading figures in the liberal professions were themselves part of and invested in the “state” to varying degrees, which throws into question the utility of current adaptations of the term for the Russian case. For recent theoretical analysis of the category, see Nancy Bermeo and Philip Nord, *Civil Society before Democracy: Lessons from Nineteenth-Century Europe* (Lanham, MD: Rowman & Littlefield, 2000); an argument for its analytic utility and applicability to Pan-Europe is made in Benjamin Nathans, “Habermas’s ‘Public Sphere’ in the Era of the French Revolution,” *French Historical Studies* 16 (1990): 620–44.
- 6 While the Anglo-American model, with its emphasis on autonomy, holds sway in literature on the professions, scholars agree there is no single model of professionalization, and historians of Continental professions—particularly German—emphasize that most “professions” worked within the state, which also shaped educational requirements and regulation of the occupation. Yet even here, historians reject that this institutional context of professional development in the German states fostered a distinct outlook, claiming that “even within public service or the military, professionalization efforts were aimed precisely at liberating practitioners from control and gaining them an

autonomous sphere of self-determination based on their expertise.” (It should be noted that this interpretation also serves the author’s historiographical purpose—to minimize the impression of a German *sonderweg*.) Geoffrey Cocks and Konrad H. Jarausch (eds.), *German Professions, 1800–1950* (New York: Oxford University Press, 1990), p. 14. Historians of France have also rejected the Anglo-American assumptions built into the category of “professions” and question the term’s utility for the French case, where many scientifically-based professions developed within the state bureaucracy; see Gerald L. Geison (ed.), *Professions and the French State, 1700–1900* (Philadelphia: University of Pennsylvania Press, 1984).

- 7 Notable exceptions to this are the following: Alfred J. Rieber, “The Rise of Engineers in Russia,” *Cahiers du Monde Russe et Soviétique* 31/4 (1990): 539–68; and idem, “Interest-Group Politics in the Era of the Great Reforms,” in Ben Eklof, John Bushnell, and Larissa Zakharova (eds.), *Russia’s Great Reforms, 1855–1881* (Bloomington: Indiana University Press, 1994).
- 8 On physicians, see Nancy M. Frieden, *Russian Physicians in an Era of Reform and Revolution, 1856–1905* (Princeton: Princeton University Press, 1981). Other scholars have focused on the efforts of different occupational groups to gain the organizational forms associated with professional autonomy in the West. See Harley D. Balzer (ed.), *Russia’s Missing Middle Class: The Professions in Russian History* (Armonk, NY: M.E. Sharpe, 1996). Laura Engelstein has emphasized that it was practitioners’ disenfranchisement that shaped their professional mission and discourse in *The Keys to Happiness: Sex and the Search for Modernity in Fin-de-Siècle Russia* (Ithaca, NY: Cornell University Press, 1992). These studies conform to the established view in the scholarship that Russia’s progressive elite were driven by either oppositional objectives or a populist ethos of service to the people, both of which involved a distancing from the state. By associating the professions with these characteristics, recent historical work has easily conflated professional groups with the more amorphous and ill-defined category of *intelligentsia*, irrespective of how specialized authority and state functions may have shaped a distinct outlook. Elise Kimerling Wirtschafter, *Structures of Society: Imperial Russia’s “People of Various Ranks”* (DeKalb: Northern Illinois University Press, 1994).
- 9 Frieden, *Russian Physicians*; John F. Hutchinson, *Politics and Public Health in Revolutionary Russia, 1890–1918* (Baltimore: Johns Hopkins University Press, 1990); Balzer (ed.), *Russia’s Missing Middle Class*.
- 10 Two works that diverge from this tendency are Engelstein, *The Keys to Happiness*; and William G. Wagner, *Marriage, Property, and Law in Late Imperial Russia* (Oxford: Clarendon Press, 1994). Engelstein identifies common ground between physicians and jurists in terms of a shared discourse, but does not address practical or occupational convergences. Wagner demon-

strates the ideological cohesion of the legal occupation, departing from the standard portrait of intra-professional fragmentation; however, he studies this occupational group in isolation.

- 11 This question has shaped the past four decades of Russian historiography, and was inaugurated by Leopold Haimson's seminal article, "The Problem of Social Stability in Urban Russia, 1905–1917," *Slavic Review* 23/4 (1964): 619–42 and 24/1 (1965): 1–22. More recently, historians have explored this problem with a broader lens, focusing on the peculiar nature of social evolution in Imperial Russia, and identifying factors that prevented the formation of cohesive, clearly-defined, and stable social formations (Rieber) and identities (Wirtschafter). Alfred Rieber demonstrates how Russia's irregular path in the transition from traditional organizational forms to class was shaped by an accretion of state-imposed social and legal bases of organization in Alfred J. Rieber, *Merchants and Entrepreneurs in Imperial Russia* (Chapel Hill: University of North Carolina Press, 1982). Extending his analysis of these particularities, Rieber develops an important analytic framework for understanding Russian social identity formation in "The Sedimentary Society," in Clowes et al. (eds.), *Between Tsar and People*, pp. 343–66. Elise Kimerling Wirtschafter, *Social Identity in Imperial Russia* (DeKalb: Northern Illinois University Press, 1997); and idem, *Structures of Society*.
- 12 An inherent teleology can be found in the Western studies of the medical profession, which culminate in descriptions of physicians' oppositional activity in the politically charged early years of the twentieth century. See Frieden, *Russian Physicians*; and Julie V. Brown, "The Professionalization of Russian Psychiatry, 1857–1911" (PhD thesis, University of Pennsylvania, 1981).
- 13 I borrow these terms from Alfred Rieber, "The Rise of Engineers in Russia"; and idem, *Merchants and Entrepreneurs*, respectively.
- 14 For example, see Bruce F. Adams, *The Politics of Punishment: Prison Reform in Russia, 1863–1917* (DeKalb: Northern Illinois University Press, 1996); Clowes et al. (eds.), *Between Tsar and People*; Peter Czap, "Peasant Class Courts and Peasant Customary Justice in Russia, 1861–1912," *Journal of Social History* 1/2 (1967): 149–78; Ben Eklof, *Russian Peasant Schools: Officialdom, Village Culture, and Popular Pedagogy, 1861–1914* (Berkeley: University of California Press, 1986); Steven P. Frank, *Crime, Cultural Conflict, and Justice in Rural Russia, 1856–1914* (Berkeley: University of California Press, 1999); Frieden, *Russian Physicians*; Thomas C. Owen, *Capitalism and Politics in Russia: A Social History of the Moscow Merchants, 1855–1905* (Cambridge: Cambridge University Press, 1981); Wagner, *Marriage, Property, and Law*; Francis W. Wcislo, *Reforming Rural Russia: State, Local Society, and National Politics, 1855–1914* (Princeton: Princeton University Press, 1990).



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- 15 A corrective to this view, which makes the opposite case, is W. Bruce Lincoln, *In the Vanguard of Reform: Russia's Enlightened Bureaucrats, 1825–1861* (DeKalb: Northern Illinois University Press, 1982).
  - 16 On views of the jury trial, see Jorg Baberowski, *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich, 1864–1914* (Frankfurt-am-Main: Vittorio Klostermann, 1996).
  - 17 This standard understanding and portrayal of the professions is based on sociological narratives that stem from the Anglo-American experience of independent corporate groups. Historians have transplanted this developmental model into studies of broader social changes, and associate the professions with the formation of a social “middle” or middle class that replaced the old aristocratic system with a meritocratic civil service, exerting professional authority through mechanisms of government and business. A classic example in this vein is Harold Perkin, *The Rise of Professional Society: England since 1880* (London: Routledge, 1989); and—extended to an international scope—idem, *The Third Revolution: Professional Elites in the Modern World* (London: Routledge, 1996). This historical association is also supported by a theoretical framework proposed by Michel Foucault. Foucault’s work on the role of trained professions in the articulation of modern society sets an agenda for all studies of modern systems. Michel Foucault, *Discipline and Punishment: The Birth of the Prison*, trans. by Alan Sheridan (New York: Random House, 1977); and idem, *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. by Richard Howard (New York: Pantheon, 1965). Foucault discusses the movement away from a unified center of authority in Europe, and to the delegation and diffusion of authority to trained professions within a law-abiding public sphere. He maintains that this transition was significant in the formation of the autonomous individual possessing civil rights and responsibilities, and argues that the emergence of the free disciplines reinforced broader social and political changes.
  - 18 Scholars have recently examined the “incomplete stages” of Russian development from a number of angles that focus on the absence or stunted character of the “middle” strata of society, be it a public sphere, social class, or what some authors take as its proxy, the professions. See, respectively, Clowes et al. (eds.), *Between Tsar and People*; Rieber, *Merchants and Entrepreneurs*; and Balzer (ed.), *Russia's Missing Middle Class*. All of these studies imply the idea of a standard trajectory of social development from which Russia diverged.
  - 19 Laura Engelstein, “Combined Underdevelopment: Discipline and Law in Imperial and Soviet Russia,” *American Historical Review* 98/2 (1993): 338–53.
  - 20 See David L. Hoffmann and Yanni Kotsonis (eds.), *Russian Modernity: Politics, Knowledge, Practices* (New York: St. Martin’s Press, 2000). As part of this revision, the authors also challenge the notion of a universal or unidirectional Western ideal of modern transformations, which continues to serve as a touchstone in Russian historiography.

## CHAPTER 1

Procedural Immunity: Medical Knowledge in  
the Age of Legal Certainty

- 1 For a welcome exception, see Richard Wortman, *The Development of a Russian Legal Consciousness* (Chicago: Chicago University Press, 1976), who has demonstrated this not to be the case for all judicial posts, and described the consequence in terms of behavior and attitudes. Specifically, Wortman shows that older officials (who trained and worked in the reign of Nicholas I) dominated the higher positions of the new legal system (the Chambers and the Senate's Cassation Departments), and this cohort proved the most ardent defenders of the independent judiciary and took the lead in establishing new patterns of conduct for the judiciary.
- 2 This generation, who we will discuss at greater length in Chapter 5, received their medical training in the 1840s and early 1850s (largely in provincial universities), worked as practicing state physicians in the 50s and onward (including court-related duties), and secured academic posts in the 60s and 70s.
- 3 See Frieden, *Russian Physicians*; Hutchinson, *Politics and Public Health*; Balzer (ed.), *Russia's Missing Middle Class*; and Wirtschafter, *Social Identity*.
- 4 See, for example, Balzer, *Russia's Missing Middle Class*; and Clowes et al., *Between Tsar and People*. In several of these essays, historians examine the different occupational groups in isolation and consequently, they depict segregated tracks of professionalization, with correspondingly unifocal depictions of the nature and manner in which the groups participated in and contributed to an emergent public sphere. A recent exception to this historiographical tendency is Engelstein, *Keys to Happiness*; and idem, "Combined Underdevelopment." However, given the nature and timeframe of her focus on the emergence of liberalism in late tsarist Russia, Engelstein considers the interrelation between law and medicine at the level of a shared *discourse* rooted in a common sociopolitical location that these occupation groups shared, rather than looking at the occupational linkages and administrative interdependences between these groups.
- 5 In her landmark study of Russian physicians, Frieden discusses these administrative regulations as something that limited and hindered Russian physicians in their quest for a Western-style model of professional autonomy (Frieden, *Russian Physicians*). Meanwhile, Soviet histories of medicine, and forensic in particular, list the accretion of medical regulations as the backbone of the development of forensic medicine (as academic discipline and practice), casting the story in the familiar narrative framework. In the imperial period, the state did not go far enough in its legislation; only after 1917 did the state grant physicians the legislation and organizational structures

that they needed to allow their science to fully blossom and serve the state to maximum effect. See, for example, S.V. Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby* (Moscow, 1968); I.F. Krylov, *Sudebnaia ekspertiza v ugovnom protsesse* (Leningrad, 1963); and M.I. Raiskii, “K istorii sudebnoi meditsiny v Rossii,” in *Sbornik tezisy k gokladam na tretim Ukrainkam soveshchaniu sudebnykh meditsinskii ekspertov i vtoroi sessii Ukrainkoi nauchnogo obshchestva sudebnykh medikov i kriminalistov* (Kiev, 1953), pp. 9–10. On the legal literature, see Wortman, *Development of a Russian Legal Consciousness*; and Peter H. Solomon, Jr. (ed.), *Reforming Justice in Russia, 1864–1996: Power, Culture, and the Limits of Legal Order* (London and New York: M.E. Sharpe, 1997).

- 6 The 1828 Rules and subsequent legislation were compiled in 1842 as the Statute of Forensic Medicine (*Ustav Sudebnoi Meditsiny*, hereafter *USM*), hereafter *USM* which constituted the third book of the Medical Statute, which enumerated physicians’ obligations. *Svod zakonov Rossiiskoi Imperii* (vol. 13), *Ustav: O narodnom prodovol’stvii, obshchestvennom prizrenii, i vrachebnye* (St. Petersburg, 1857). The Statute of Forensic Medicine remained active and virtually unchanged until 1917. For further discussion of this legislation see Elisa M. Becker, “Judicial Reform and the Role of Medical Expertise in Late Imperial Russian Courts,” *Law and History Review* 17/1 (1999): 1–26. For the rules of legal procedure, see Peter’s decrees, “On Form of the Courts” and “Military Process,” and note 139 below.
- 7 Sergei A. Gromov, *Kratkoe izlozhenie sudebnoi meditsiny, dlia akademicheskago i prakticheskago upotrebleniia* (St. Petersburg, 1832), p. 3.
- 8 *Ibid.*, p. 121 (point 69); and *USM*.
- 9 To briefly trace the development of medico-legal legislation across the Continent, one begins with the point of origin, the Roman Church and Northern Italian cities during the thirteenth century, when and where Roman-canonical procedure first took shape. The sweep across Europe moved from Italy to central French courts by the latter part of the thirteenth century (where the office of sworn surgeon was created in 1311), and to Germany, where inquisitorial procedure is evident by mid-fourteenth century (and the earliest medico-legal regulations appear in the municipal statutes of 1407–1411). The Carolina in 1532 marks the full reception of Roman-canonical procedure in Germany, and scholarly consensus locates the origin of legal medicine as a science in its medical provisions. And, of course, England (in the absence of a Roman-canonical/civil law system) enacted no such legislation regarding compulsory medical investigations (and only in 1836 enacted its first legislation that touched on medico-legal issues—and that was simply a provision for payment). To this day medical investigation is not required by English law for a murder conviction. A. Esmein, *A History of Continental Criminal Procedure, with Special Reference to France*, trans. by J. Simpson (Boston: Little, Brown, and Company: 1914); and Catherine Crawford, “The Emer-

- gence of English Forensic Medicine: Medical Evidence in Common Law Courts, 1730–1830” (PhD thesis, Oxford University, 1987).
- 10 On why Russia was late to enter this Continental trend and wide-ranging shift toward more rational modes of proof which characterized late medieval European jurisprudence, see Daniel H. Kaiser, *The Growth of the Law in Medieval Russia* (Princeton: Princeton University Press, 1980), pp. 173–74. Kaiser explains that in Russia there was no equivalent scholarly interest in the law before the seventeenth century, as there was at the great medieval universities of Bologna and Paris, where legal scholars revived Roman and canon law as part of the larger re-acquaintance with classical tradition. Furthermore, not only were there no schools of law where principles of evidence might be discussed, but the churchmen in medieval Russia who were conversant with the law brought with them not so much Roman as Byzantine law.
  - 11 “Ustav voennyi: Voinskie artikuly” (1716), in *Polnoe sobranie zakonov Rossiiskoi Imperii*, ser. I (St. Petersburg, 1830), no. 3006, 30 March 1716; no. 3010, 10 April 1716 (hereafter *PSZ*). The *PSZ* in its entirety is *Polnoe sobranie zakonov Rossiiskoi Imperii 1649–1913*, 234 vols. (St. Petersburg, 1830–1916). Peter I reigned from 1682 to 1725.
  - 12 On the legal complex and process before Peter’s reign, see Kaiser, *Growth of the Law*.
  - 13 To clarify an easily confused legislative detail: the Military Articles (*Artikul Voinskii*) comprised the second part of the Military Statute (*Voinskii Ustav*), and were published separately in 1714 and 1715, as *Artikul Voinskii kupno s protsessom nadlezhashchii sudiashchim* (St. Petersburg, 1715).
  - 14 *PSZ*, 5, no. 3006: “Kratkoe izobrazhenie protsessov ili sudebnykh tiazhb,” ch. I.
  - 15 On the sources of the Military Articles, see the definitive P.O. Bobrovskii, *Voennoe pravo v Rossii pri Petre Velikom*, pt. 2, *Artikul Voinskii*, vol. I, *Vvedeniie: Manifest, prisiaga i pervye chetyre glavy* (St. Petersburg, 1882), pp. iv–vi, 4, and 40–41; and idem, *Proiskhozhdenie artikula voinskogo i izobrazheniia protsessov Petra Velikogo po ustavu voinskomu 1716 g.*, 2nd revised ed. (St. Petersburg, 1881), pp. 40–41. For their influence on later laws, see D.N. Bludov, “Obshchaia ob”iasnitel’naia zapiska,” in *Proekt ulozheniia o nakazaniiaakh* (St. Petersburg, 1871), p. viii. On the foreign models, see Wortman, “Peter the Great and Court Procedure,” *Canadian–American Slavic Studies* (Summer 1974): 303–10; and C. Peterson, *Peter the Great’s Administrative and Judicial Reforms: Swedish Antecedents and the Process of Reception* (Stockholm, 1979), pp. 337–38.
  - 16 Lindsey Hughes, *Russia in the Age of Peter the Great* (New Haven: Yale University Press, 1998), p. 76. According to Hughes, the sources included foreign statutes and manuals, Swedish codes from the reigns of Gustav Adolph II and Charles XI, and Austrian texts (Charles V [1532], Ferdinand III, and Leopold I).

- 17 For the two centuries that followed Peter's Military Statute (1716), the central administration tested and licensed all practitioners, set standards of work-related behavior, adjudicated cases of medical ethics, and supervised medical employment. In addition, physicians were obligated to perform designated state duties, including both forensic as well as therapeutic (such as being required to serve in times of emergencies such as wars and epidemics). For more on these broader issues, see Frieden, *Russian Physicians*, p. 27.
- 18 *Ustav voennyi* (1716), g. XIX, art. 154. According to Shershavkin, based on the manuscript variant of the 1714 Articles, Peter personally edited article 154. After this editing, the article appeared in *Artikyl Voinskii* (1714) and (1715), and in the *Voinskii Ustav* (1716). For full text of article 154, see Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*, pp. 33–34. For further discussion of this article, see also I. Ebrozhek, *Kratkii istoricheskii ocherk sudebnoi meditsiny* (Odessa, 1867). To be sure, in practice, physicians' participation was somewhat more complicated and bureaucratically convoluted than such a stark article would suggest. For two cases from 1739 that illustrate the manner in which this participation took place, see Ia.A. Chistovich, "Dva sudebno-meditsinskikh dela iz vremen Meditsinskoi kantseliarii 1739 g.," in *Voенно-meditsinskii zhurnal* (1857).
- 19 See Shershavkin, *Istoriia otechestvennoi sudebnomeditsinskoi sluzhby*.
- 20 Ebrozhek, *Kratkii istoricheskii ocherk*; V.F. Chervakov, *Istorii sudebnoi meditsiny i sudebnomeditsinskoi ekspertizy. Lektsii dlia studentov 5 kursa* (Moscow, 1956), pp. 7–8; S.V. Shershavkin, *Istoriia russkoi sudebnomeditsinskoi sluzhby (XVII–XIX veka)*, Avtoreferat, (Moscow, 1955), p. 4; and idem, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*.
- 21 Ebrozhek attributes the crudeness of the medical reports from this period to the composition of the *prikazy* responsible for compiling them: "it was difficult at that time to expect a more thorough dispatch, since the staff of the highest medical institution [*Aptekarskii prikaz*] was composed of *doktora*, *lekari*, apothecaries [*aptekari*], oculists, translators, alchemists, and watchmakers." See also Legnov, in *Moskov. Vrachebnoi Zhurnal* 2–3 (1854).
- 22 Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*, p. 5. In this earlier period, corpses were inspected with the goal of establishing the immediate cause of death in order to prevent the spread of infectious diseases, and if death turned out to be violent, then judicial-administrative organs, on the basis of these medical conclusions, initiated a search for the criminal. With regard to "living individuals," the goal of the medical examination was to provide medical and legal characterization of bodily injuries.
- 23 See, for example, I. Chatskin (1865); S. Lovtsov; I. Bertenson; V. Rozhanovskii (1927); and S.V. Shershavkin (1968).
- 24 Chistovich, "Dva sudebno-meditsinskikh dela." See also, I. Chatskin, "Neskol'ko zamechanii ob istorii sudebnoi meditsiny v Rossii," v kn. A. Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny dlia vrachei i iuristov*, s

- ukazaniiami na zakonodatel'stva: Avstrii, Prussii, Melkikh Germanskikh Gosudarstv, Frantsii i Anglii per. s nemetskago s primechaniiami i sravnitel'nyimi ukazaniiami na Russkoe zakonodatel'stvo, I. Chatskin* (Moscow, 1865), pp. xxxii–xxxiii. The lineage of this top state medical bureau—which took a series of names over the centuries—was *Aptekarskii prikaz* (founded 1600), *Aptekarskaia Kantseliaria* (renamed in 1707), *Meditsinskaia Kantseliaria* (1725), *Meditsinskaia Kollegiia* (1763), and Medical Council (1803). On the history of this institution in its various permutations, see A.K. Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny s toksikologiei pri Voen.-Med. Akad., 1798–1898* (St. Petersburg, 1898), pp. 6–23.
- 25 *Zakony Ugolovnye*, kn. II, “O sudoproizvodstve po prestupleniiam,” Otdelenie 2, “O sile dokazatel'stve i ulike v osobennosti,” (St. Petersburg, 1842), arts. 1180–207.
  - 26 Hughes, *Russia in the Age of Peter the Great*.
  - 27 Ibid.; Evgenii V. Anisimov, *The Reforms of Peter the Great: Progress through Coercion in Russia* (Armonk: M.E. Sharpe, 1993); Wortman, *Development of a Russian Legal Consciousness*.
  - 28 See, for example, Hughes, *Russia in the Age of Peter the Great*, p. 77.
  - 29 Wortman, *Development of a Russian Legal Consciousness*, p. 14.
  - 30 Chatskin, “Neskol'ko zamechanií,” pp. xxxii–xxxiii.
  - 31 Ibid.
  - 32 Hughes, *Russia in the Age of Peter the Great*, p. 121.
  - 33 Anisimov, *Reforms of Peter the Great*, p. 24. On the influence of rationalism on Peter's reign and reforms, see also Hughes, and Richard Wortman, *Scenarios of Power: Myth and Ceremony in Russian Monarchy*, vol. 1 (Princeton, 1995), chapter 2. For a fresh analysis of how the idea of “general welfare” was incorporated into Peter's rationalist ethos and Petrine ideology more broadly, see Wortman, *Scenarios of Power*, esp. pp. 61–78.
  - 34 While the introduction of inquisitorial procedure was gradual and varied across Continental Europe, in general it was a medieval development (with important principles appearing in the thirteenth century) that appeared in “mature” form in statutes by the sixteenth century. By the end of the 1500s, the system of formal proof dominated the secular courts of the Continent. See John H. Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, MA: Harvard University Press, 1974), pp. 133–37; and Arthur Engelmann, *A History of Continental Civil Procedure*, trans. by R.W. Millar (Boston, 1927), p. 44. On the divergence between the French and German paths of development, see Langbein, *Prosecuting Crime*, p. 221.
- In Russia, while inquisitorial process was formally introduced in 1716, the practice of judicial inspection was already evident in the 1600s. With regard to forensic medicine, its intellectual roots date back to the sixteenth century and Ambroise Pare's *Treatise on Reports* (1575), the earliest European guide

to medico-legal practice. See, for example, Catherine Crawford, "Legalizing Medicine: Early Modern Legal Systems and the Growth of Medical-Legal Knowledge," Michael Clark and Catherine Crawford (eds.), *Legal Medicine in History* (Cambridge: Cambridge University Press, 1994), p. 103; and Chatskin, "Neskol'ko zamechanii," p. xxix. The emergence of anatomy and anatomical dissection, the area of medicine from which forensic medicine originally and primarily drew, also dated to the sixteenth and seventeenth centuries in Europe. On the origins of anatomical dissections, see Ruth Richardson, *Death, Dissection and the Destitute* (London and New York: Routledge & Kegan Paul, 1988), esp. pp. 30–51; and Nancy G. Siraisi, *Medieval and Early Renaissance Medicine* (Chicago: University of Chicago Press, 1990). In Russia, Peter I founded the country's first anatomical schools in the early eighteenth century, and by the end of that century (1799) the first department of forensic medicine was instituted. With the opening of universities, the first university *Ustav* (1804) mandated departments of forensic medicine (which fell under the broader rubric of "state medicine"). Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*.

- 35 Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*, p. 78.
- 36 Ibid., p. 79.
- 37 See note 6.
- 38 A.F. Koni, "O zadachakh russkogo sudebno-meditsinskogo zakonodatel'stva," Speech presented on 27 October 1890 and reprinted in *Iuridicheskaiia letopis'* 1 (1891): 74.
- 39 W. Bruce Lincoln, *In the Vanguard of Reform: Russia's Enlightened Bureaucrats, 1825–1861* (DeKalb: Northern Illinois University Press, 1982). See also Walter M. Pintner and Don K. Rowney (eds.), *Russian Officialdom: The Bureaucratization of Russian Society from the Seventeenth to the Twentieth Century* (Chapel Hill: University of North Carolina Press, 1980).
- 40 Chatskin, "Neskol'ko zamechanii"; Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*; and Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*.
- 41 See Frieden, *Russian Physicians*, chapter 1 and p. 337. According to Frieden, the diverse but lower social groups from which medical students hailed included Cossacks, soldiers, pharmacists, barber-surgeons, churchmen, petty officials, foreign merchants, and artisans.
- 42 N.I. Ivanovskii (ed.), *Istoriia Imperatorskoi Voенno-Meditsinskoi (byvshei Mediko-khirurgicheskoi) Akademii za sto let (1798–1898)* (St. Petersburg, 1898), pp. 141–43.
- 43 For biographical material on each of these men, see *Russkie vrachi pisateli*, compiled by Lev F. Zmeev, 1st ed. (St. Petersburg, 1886). For a more detailed look at S.A. Gromov's career, including official, academic, and scholarly/social activities (participation in societies), and in particular his

tenure as professor on the Department of Obstetrics (*akusherstvo*), Forensic Medicine, and Medical Police at the St. Petersburg Medical-Surgical Academy, see Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*, pp. 42–67.

- 44 As Chapter 3 discusses, physicians involved in the drafting of the judicial reform statutes raised this issue, but the majority of non-medical participants rejected their proposed remedies and therefore the reform did not resolve the problem. See Becker, “Judicial Reform.” On why the police wanted quick and dirty medical examinations, see Chapter 3.
- 45 Rossiiskii gosudarstvennyi istoricheskii arkhiv (RGIA), f. 1294, op. 6, 1834, d. 327, ll. 493–494ob. “O nepravil’nom tolkovanii Nastavleniia Vracham o vskrytii mertvykh tel.” The 1828 Rules stated that forensic-medical examination and dissection were necessary “if a healthy person dies suddenly from unknown reasons.” Instead, as Kazan officials complained, the police “following old customs” called for the examination of corpses when they were completely unnecessary and there “was not the slightest doubt of violent death.” The Kazan medical officials proposed that the Medical Council issue additional, more detailed instructions, but Gromov thought his 1828 Rules were explicit enough, and opted instead to simply “confirm” to police that they strictly follow the Instructions.
- 46 Indeed, this uniquely Russian separation between academic and practical forensic medicine was structured by law, which assigned (as of 1797) forensic medical duties to city and district physicians. As we have seen earlier, there remained slippage in spite of the law, and police “requested” professors to conduct forensic dissections for them, with regularity, up to the reform period. This formal divide was considerably eroded with the judicial reform, which allowed that any physician could be called to testify at the new open “trial” phase of proceedings.
- 47 On the different permutations and branching of the medical departments upon the *Ustavy* of 1804, 1835, 1863, and 1884, see *Za sto let: Biographicheskii slovar’ professorov i prepodavatelei Imperatorskago Kazanskago universiteta (1804–1904)*, pod red. N.P. Zagoskin. Chast’ II: *Fakul’tety iuridicheskii i meditsinskii, prepodataveli iskusstv i dobavleniia spravocnago kharaktera* (Kazan, 1904), Prilozhenie, “Raspredelenie kafedr po ustavam 1804, 1835, 1863, 1884 godov,” pp. 391–401.
- 48 The examples abound. In the 1840s, Kharkov Professor of Forensic Medicine, I.A. Sviridov, taught comparative anatomy, as well as medical police and forensic medicine. Also at Kharkov University, F. Gan wrote his 1866 dissertation on forensic-medical blood stains, and then became prosecutor (*prozektor*) of the anatomy department, where he taught teratology and some sections of pathological anatomy. This crossover phenomenon was particular to the field, not Russia. In France, for example, Mathieu Orfila,



- the dean of the Paris Medical School—renowned for its development of and emphasis on pathological anatomy (in the first quarter of the nineteenth century)—was a leading figure and author in forensic medicine and toxicology.
- 49 Dissections became essential to medical education as of 1839, when the state ordered that medical students had to perform a forensic-medical dissection as part of their graduation exam. On collegially performed dissections, see Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*, p. 58.
  - 50 Russell Maulitz, *Morbid Appearances: The Anatomy of Pathology in the Early Nineteenth Century* (Cambridge: Cambridge University Press, 1987), p. 58.
  - 51 Johann Ludwig Casper, *A Handbook of the Practice of Forensic Medicine Based upon Personal Experience*, vol. III, trans. from the 3rd edition by George William Balfour, M.D. (London: The New Sydenham Society, 1860), p. 56 (originally published in October 1856).
- Apparently, such blurring of lines was common. In Prussia, the Scientific Commission for Medical Affairs, in its reviews of the medico-legal reports compiled within the monarchy, often found fault with the physician “for losing himself without sufficient cause in a maze of diagnostic pathologic-anatomical description.” The Prussian Regulation of 15 November 1858 addressed and cautioned against this slippage in its official directions. Forensic medicine and pathology remained intertwined up to the last quarter of the century. In Vienna, a nineteenth-century center of forensic medicine, this intertwining was reinforced at the institutional level; for example, all forensic autopsies were performed in the Institute of Forensic Medicine, which was housed until 1922 on the first floor of the Institute of Pathological Anatomy. The process of disentanglement stemmed largely from a faculty shift. When named in 1875 as the new Chair of Forensic Medicine at the Vienna faculty, Eduard Hofmann began to free forensic medicine from its hold under the wing of pathology. Due to the nature of these two fields, corpses were the currency of such boundary and power struggles, and Hofmann skillfully redirected authority over all Viennese autopsy material from the medical police into the hands of the representative of forensic medicine at Vienna’s General Hospital. Erna Lesky, *The Vienna Medical School of the 19th Century* (Baltimore: The Johns Hopkins University Press, 1976), p. 553.
- 52 Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*.
  - 53 See E.O. Mykhin, *Voprosy, iz fiziologii, sudebnoi meditsiny i meditsinskoi politsii, predлагаемые на chastnykh i publichnykh ispytaniikh, anatomii, fiziologii, sudeo-vrachebnoi nauki* (Moscow, 1833), pp. 51–57.
  - 54 See in particular: RGIA, f. 1294, op. 6, 1843, d. 10. “O razsmotrenii rukopisi Gospodina Predsedatel’ia Soveta, pod zaglaviem: Rukovodstvo k poznaniui Rossiiskikh zakonov i Gosudarstvennoi sluzhby dlia vrachei.”

- 55 See Esmein, *History of Continental Criminal Procedure*, chapter 3, esp. pp. 256–71.
- 56 On French and German codes, the statutes which elucidated the rules of proof, and where the medical provisions fit within those, see Crawford, “Emergence of English Forensic Medicine,” p. 164. For the Russian equivalent, see *Zakony Ugolovnye*, kn. II, “O sudoproizvodstve po prestupleniam,” Otdelenie 2, “O sile dokazatel’stve i ulike v osobennosti,” arts. 1180–207.
- 57 Wortman, *Development of a Russian Legal Consciousness*, p. 12.
- 58 Esmein, *History of Continental Criminal Procedure*, p. 251.
- 59 On the origin of the theory of legal proofs see *ibid.*, pp. 251–71, and for a detailed description of the different types of proofs in the Continental system of evidence, pp. 617–30.
- 60 John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 1969). On the history and role of the commentators, see pp. 10 and 60–65; on the canonists, see pp. 11–14 and 23. On the English side of the story, see Crawford, “Emergence of English Forensic Medicine,” pp. 166–67. In short, English law preferred lay consensus regarding justice over rigorous demonstrations of truth. The system’s principle of subjective persuasion presented no occasion for specified standards of evidence (medical or otherwise) with respect to either crime or guilt. That said, as Crawford has shown, English courts were not unreceptive to medical evidence, and magistrates might even commission it at the pre-trial stage, but the method of adjudication by jury did not *require* it.
- 61 Langbein has argued that the system of legal proof lost its monopoly in France and Germany during the seventeenth century because in cases of capital crime that eluded complete formal proof, the less exacting standards respecting petty crime began to be applied; punishments short of the death penalty could thereby be imposed without full proof. John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1976), pp. 47–60. However, it does not follow that the use of this expedient should have dampened institutional zeal for rigorous proof, especially proof of the *corpus delicti*. I am grateful to Ken Alder for bringing to my attention the link between the rise of probabilistic thinking and changing standards of proof in Europe (and hence the move away from legal certainty in the strict sense as a goal of proceedings).
- 62 Merryman, *Civil Law Tradition*, p. 126.
- 63 Wortman, *Development of a Russian Legal Consciousness*, pp. 15–16. Peter followed European models and indigenous practice in allowing torture to be used to induce confession, and in surrounding this permission with numerous limitations to prevent its abuse. See also, Wortman, “Peter the Great and Court Procedure”; *PSZ (IP)*, no. 4344, 5 November 1724.

- 64 *Zakony Ugolovnye*.
- 65 A.F. Koni, “O polozhenii vracha-eksperta na sude,” speech delivered at the Fifth Pirogov Congress of Russian Physicians, *Trudy V s’ezda obshchestva russkikh vrachei v pamiat’ N.I. Pirogov* (St. Petersburg, 1893), p. 151.
- 66 Esmein, *History of Continental Criminal Procedure*, p. 622.
- 67 The term *sostav prestupleniia* entered Russian legal terminology in the mid-nineteenth century, when eminent jurist and scholar V.D. Spasovich introduced it in his 1863 textbook as the translation of *Thatbestand*, the German word for *corpus delicti*, and its associated, more theoretical meaning of “the constituent elements of a crime,” foreshadowing its modern usage. *Thatbestand* (nineteenth-century German spelling) is comprised of two words, *That* or deed/action and *bestand* (past tense of *bestehen*) to be comprised of. Legal and medical practitioners, however, continued to employ the term in its original procedural sense for the remainder of the century, and used the terms *corpus delicti* and *sostav prestupleniia* interchangeably. The term evolved further during the Soviet period to mean the objective and subjective (mental) elements which must be present to constitute a criminal offense, and its migration from criminal procedure to criminal law was made more complete. On the development of the term in the Soviet period see, A. Trainin, *Uchenie o sostave prestupleniia* (Moscow: Iuridicheskoe izdatel’stvo, 1946). On the variability in nineteenth-century legal definitions, see N.S. Tagantsev, *Kurs russkago ugovnago prava*. Chast’ obshchaia. Kniga perviaia. *Uchenie o prestuplenii* (St. Petersburg. 1874). On the introduction of the term in Russian legal scholarship, see V.D. Spasovich, *Uchebnik ugovnogo prava*, vol. 1 (1863).
- 68 Esmein, *History of Continental Criminal Procedure*, p. 165.
- 69 It is worth noting that English courts employed the *corpus delicti* concept differently. See Bruce P. Smith, “The Presumption of Guilt and the English Law of Theft, 1750–1850,” *Law and History Review* 23/1 (Spring 2005): 133–171.
- 70 The inspection of the *corpus delicti* by skilled men was a very old custom, dating to the seventeenth century. On the subtleties of the *corpus delicti* doctrine vis-à-vis different types of offenses (e.g., those which left material traces vs. those which did not) see Esmein, *History of Continental Criminal Procedure*, pp. 622–23.
- 71 See Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*.
- 72 Crawford, “Emergence of English Forensic Medicine.”
- 73 1716 Mart 30 (3006); Military Articles, art. 154; appearing in other decrees as 1779; 1797; 1809; 19 December 1828 (2531), and *Zakony Ugolovnye*, art. 1192. The term *svidetel’stvo* (*visum repertum*) designated the physician’s written report that intended to respond to all requests from a state office, based on his medical examination of a subject; this report served as his testimony for the courts.

- 74 Originally appeared as 1716 Mart 30 (3006), later in 1842, *Zakony Ugolovnye*, art. 1180. Complete proof was required for capital punishment, which indeed put great responsibility and consequence in the testimony of physicians in determining the fate of the accused.
- 75 For these conditions in Russian law, see *Zakony Ugolovnye*, arts. 1193–96. First, *two* competent witnesses had to be found testifying to the same fact. (An isolated testimony certainly was not valueless, but it was not allowed to be grounds for a capital sentence.) Second, the two witnesses had to be eye-witnesses. (Hearsay witnesses, no matter their number, could not constitute a complete proof.) Third, the witnesses had to be “affirmative.” That is, if they expressed themselves in language of doubt (such as “If I remember correctly ...”), they were considered “vacillating” and their statements were rendered less valuable. Fourth, the depositions had to be identical for the three interrogations undergone by the witnesses at the different phases of the process. And fifth, the witnesses could not be “impeachable.” Only after meeting these relatively elusive requirements would two perfect testimonies by lay people (regular witnesses) achieve “complete proof” status—the status which the physician, by himself, garnered *a priori* by the presentation of his conclusions. If and when these requirements were met, however, the two perfect testimonies inevitably led to conviction. Esmein, *History of Continental Criminal Procedure*, pp. 623–24.
- 76 *USM*, art. 1743.
- 77 Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*, pp. 118–21.
- 78 E.F. Bellin, “Ocherk uslovii deiatel’nosti nashei sudebno-meditsinskoi ekspertizy; prichiny neudovletvoritel’nosti eia i mery k ustraneniuiu ikh,” *Vestnik obshchestvennoi gigieny, sudebnoi i prakticheskoi meditsiny* 2/2 (1889): 1–24.
- 79 *USM*, art. 174.
- 80 Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*, pp. 48–49. Emphasis my own.
- 81 See Simonich, “Sudebno-meditsinskaia ob’ektivnost’,” *Arkhiv sudebnoi meditsiny i obshchestvennoi gigieny* (hereafter *Arkhiv sud. med.*) 3 (1867): 154–84; and E.V. Pelikan, “O znachenii estestvennykh nauk dlia iurisprudentsii,” *Arkhiv sud. med.* 2 (1868): 37–46. (Speech presented at the St. Petersburg Congress of Russian Naturalists, 28 December 1867.)
- 82 According to the law, the exceptions when medical testimony could lose its strength were the following: 1) when all legal forms or formalities (*obriadnosti*) and the rules that guide Forensic Medicine are not observed; 2) when the judge finds the testimony insufficient to the appropriate explanation of the suspicious judicial case; 3) when a party in the case brings a complaint against any kind of bias of the physician and from which arose his incorrect judgment; 4) when the physician recognizes himself to be unqualified to give a decisive opinion in the case; and 5) when there is disagreement between the opinions of those physicians who conducted the investigation. Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*, p. 123.

- 83 On the institution of the Medical Council and its institutional function under the Ministry of Internal Affairs, see I. Moiseev, *Meditsinskii Sovet Ministerstva Vnutrennikh Del. kratkii istoricheskii ocherk* (St. Petersburg, 1913).
- 84 On Russia's borrowing of its medical administrative organization from the Prussian model, see "Ofitsial'naia chast'," *Arkhiv sud. med.* (1868); and V.A. Rozhanovskii, *Sudebno-meditsinskaia ekspertiza v dorevoliutsionnoi Rossii i v SSSR* (Moscow, 1927).
- 85 These were roughly in keeping with the Austrian law, article 85 (points 2 and 5), cited in Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*. On Austrian procedure, see Herbert Hausmaninger, *The Austrian Legal System* (The Hague, 2000).
- 86 This procedure applied exclusively to cases when the experts were physicians or chemists. The procedure for review was different for non-medical/non-scientific experts; in such cases of doubt the court could question the experts directly concerning the misunderstandings, and if that did not clear up matters, the inspection (*osmotr*), so far as it was possible, was to be repeated by the same or other experts. Austrian law, art. 85, cited in Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, pp. 12–13.
- 87 Ibid., art. 85. On the French system of review of medical decisions see Crawford, "Emergence of English Forensic Medicine," pp. 177–79.
- 88 Simonich, "Sudebno-meditsinskaia ob'ektivnost'," p. 157.
- 89 Ibid.
- 90 Ibid.
- 91 Wortman, *Development of a Russian Legal Consciousness*. See also Chapter 4 of this book for discussion of changes in legal personnel, training, and qualifications in the nineteenth century.
- 92 RGIA, f. 1294, op. 6, 1864, d. 108, l. 195. According to the *nachal'nik*'s description, this slanderous commentary was based on statements by the provincial Medical Board that the Judicial Chamber allegedly took out of context and distorted.
- 93 Ibid., ll. 193ob–194.
- 94 Ibid., ll. 195–195ob.
- 95 Ibid., l. 194ob.
- 96 On how this played out in the Western countries, see Jan Goldstein, *Console and Classify: The French Psychiatric Profession in the Nineteenth Century* (Cambridge: Cambridge University Press, 1987); Ruth Harris, *Murders and Madness: Medicine, Law and Society in the Fin de Siècle* (Oxford: Oxford University Press, 1989); James C. Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America* (Oxford: Oxford University Press, 1993); Robert Nye, *Crime, Madness and Politics in Modern France: The Medical Concept of National Decline* (Princeton: Princeton University Press, 1984); Charles E. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and Law in the Gilded Age* (Chicago: University of Chicago Press, 1968);

- Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh: Edinburgh University Press, 1981); and Janet Tighe, “A Question of Responsibility: The Development of American Forensic Psychiatry, 1838–1930” (PhD thesis, University of Pennsylvania, 1983).
- 97 For more on Panin’s efforts to tighten up the court system, see Wortman, *Development of a Russian Legal Consciousness*, pp. 176–77. His objectives also coincided more broadly with Nicholas I’s efforts to bring greater “accountability” to the administration, and Panin complied by introducing measures to improve surveillance of the courts.
- 98 RGIA, f. 1294, op. 6, 1843, d. 130, ll. 526–527ob.
- 99 Ibid.
- 100 Bureaucratic protocol held that the Medical Department received correspondence, and forwarded it to the Medical Council for their discussion and conclusion.
- 101 RGIA, f. 1294, op. 6, 1843, d. 130, ll. 528–529ob.
- 102 Ibid., l. 529.
- 103 Ibid., ll. 529–30.
- 104 PSZ, II, t. XIX, no. 17611 (14 February 1844).
- 105 Ibid., p. 89.
- 106 The term *vmeniaemost’* derives from *sposobnost’ ko vmeneniiu* or the capacity for imputation, which derives from the verb *vmeniat’*, to impute or charge. Russian law defines *vmeniaemost’* as a condition of responsibility (*otvetstvennost’*) in the legal or punishable sense, and maintains a distinction between the two terms, but they are related. It is the capacity to bear responsibility that is the ultimate effect of the term *vmeniaemost’*. Nineteenth-century commentators and jurisprudence employed the concept in broad meaning and application. For an elaboration of the term in contemporary legal thought, see Tagantsev, *Kurs russkago ugovnago prava. Chast’ obshchaia. Kniga pervaiia. Uchenie o prestuplenii*. On the legal formulations of the category with regard to components of intellect and will, see Chapter 5 notes 23 and 30.
- 107 For the historically specific and context-dependent meanings of the terms “free will” and “determinism” within this debate, see Daniel Todes, “From Radicalism to Scientific Convention,” esp. pp. 15–68. Todes offers a comprehensive and illuminating analysis of this debate in relation to the development and institutionalization of biological psychology in imperial Russia.
- 108 Barshev expressed his later views on expert status in the conservative literary and political journal, *Russian Messenger*. Barshev’s post-reform position on expert status is discussed in Chapter 5. See S.I. Barshev, “K voprosu o vmeniaemosti,” *Russkii vestnik* 78 (1868): 519–37. On Barshev’s position in relation to the other “camps” on the question of responsibility, see I.M. Feinberg, *Uchenie o vmeniaemosti v razlichnykh shkolakh ugovnogo prava i v sudebnoi psikhiatrii* (Moscow, 1946).

- 109 Todes situates this portrait within a binary schema of “conservatives vs. progressives.” Barshev’s main publications include: “O mere nakazanii” (written for the degree of Doctor of Jurisprudence, 1840); *O vmenenii v prave. Rech, proiznesennaia v torzhestvennom sobranii Imperatorskago Moskovskago Universiteta*, 15 June 1840 (Moscow, 1840); and *Obshchiia nachala teorii i zakonodatel’sstva prestupleniikh i nakazaniikh* (1841).
- 110 *Biographicheskii slovar professorov i prepodavatelei Imperatorskago Moskovskago Universiteta, za istekaiushchee stoletie, so dnia uchrezhdeniia ianvaria 12-go 1755 goda, po den’ stoletniago iubileiia ianvaria 12-go 1855 goda, sostavlennyi trudami professorov i prepodavatelei, zanimavshikh kafedry v 1854 godu, i raspolozhennyi po azbuchnomu poriadku, chast’ 1* (Moscow, 1855), pp. 63–66.
- 111 Barshev, *O vmenenii v prave*.
- 112 Ibid.
- 113 Ibid., p. 47.
- 114 Barshev’s view in relation to the polemics of the period is discussed in Chapter 5. Barshev elaborated this view in his article “K voprosu o vmeniaemosti.”
- 115 One of the main proponents of this view was Kazan Professor of Psychiatry A.U. Freze. See Freze, “O sudebno-psikhiatricheskikh osmotrakh,” *Arkhiv sud. med.* 2/1 (1866): 1–18; and idem, *Ocherk sudebnoi psikhologii* (Kazan, 1874).
- 116 For the legal view of this status question vis-à-vis psychiatric testimony, see the review in *Journal of the Ministry of Justice* of the new medical journal *Arkhiv sudebnoi meditsiny i obshchestvennoi gigieny*, which included a review of Freze’s article, “O sudebno-psikhiatricheskikh osmotrakh.” “Kritika and Bibliografiia,” *Zhurnal Ministerstva Iustitsii* (hereafter *Zh. Min. Iust.*) 30/10 (1866): 181.
- 117 See Sidney Monas, *The Third Section: Police and Society in Russia Under Nicholas I* (Cambridge, MA: Harvard University Press, 1961).
- 118 G.I. Blosfel’d, *O vliianii sudebnoi meditsiny na sudoproizvodstvo i neobkhodimosti dlia pravovedov znakomit’sia blizhe s etoi naukoj. Rech, proizvnesennaiia v torzhestvennom godichnom sobranii imperatorskago kazanskago universiteta*, 6 Iiunia 1848 (Kazan, 1848); and I.F. Leonov, *O razvitiu sudebnoi meditsiny otechestvennoi i otnoshenie ee k russkomu zakonodatel’stu* (Kiev, 1845).
- 119 Immediately upon receiving his degree of *lekar’* from Kharkov University, Leonov accepted a position as prosecutor (responsible for preparing dissections for demonstration) with the University’s anatomy department, and was assigned to read lectures in anatomy, and later, in all subjects included in that department (anatomy, physiology, forensic medicine, and medical police). Though he did not travel abroad, Leonov used French and German texts in his teaching of forensic medicine, including authors Orfila, Briand and

Chaude, Devergie, and Friedreich—in addition to the requisite single Russian textbook on the subject by his contemporary in the capital, Gromov. However, seven years of teaching and 112 dissections later, when the position of professor of anatomy opened up in 1837, Leonov was skipped over on the grounds of his lack of knowledge of anatomy and weak health—despite the fact that in the same year he received his degree of Doctor of Medicine and Surgery, the highest academic degree in medicine. Besides Leonov's 1838 dissertation on a medical-surgical topic, his other publications reflected a small yet eclectic body of work, one article on suicide, the other on Ukrainian folk medicine. See "O samoubiistve," *Voenno-meditsinskii zhurnal* 55/1 (1850); and "Prostonarodnyiia malorossiiskiiia lekarstva," *Voenno-meditsinskii zhurnal* 60/2 (1852).

- 120 "State Medicine" was the term used in academic daily life and in the department's course program to refer to the more unwieldy official name for the "Department of Forensic Medicine, Medical Police, History and Literature of Medicine, Encyclopedia, and Methodology." V.F. Chervakov, E.E. Matova, S.V. Shershavkin, *150 let kafedry sudebnoi meditsiny 1-ogo Moskovskogo ordena Lenina Meditsinskogo Instituta (1804–1894)* (Moscow, 1955), p. 40.
- 121 These subjects included hygiene and nutrition (*dietetika*), medical police, medical-state administration, general veterinary medicine, and epizootic illnesses.
- 122 *Biograficheskii slovar' universiteta sv. Vladimira* (Kiev, 1884), p. 365.
- 123 It is unclear if Blossfeld landed the job because of his prestigious European connection and educational background, or the sheer strength of his application materials, which included the manuscript of his essay "De medicina forensis ratione, historia et litteratura" and three synopses of proposed teaching plans. *Biograficheskii slovar' professorov i prepodavatelei imperatorskago kazanskago universiteta*, pp. 10 and 137–39.
- 124 Not simply a secondary sidebar, this was a considerable obligation, equal to the time devoted to teaching medical students. Leonov devoted 4–6 hours/week to teaching in the medical faculty, and 4 hours to teaching students in the legal faculty. *Biograficheskii slovar' universiteta sv. Vladimira*, p. 366. Leonov taught on the Kiev legal faculty from 1847–1853, for seven of his total eleven years at the University. Blossfeld taught on the Kazan legal faculty from 1843–1857. The teaching of forensic medicine to jurists was introduced gradually in different institutions of higher education, for example, in Dorpat University (1802), in St. Petersburg in the School of Jurisprudence (*Uchilishche pravovedenie*) (1835), and in Kazan University (1843). Blossfeld, "O vliianii sudebnoi meditsiny," p. 26.
- 125 G.I. Blossfeld, *Nachertanie sudebnoi meditsinoi dlia pravovedov* (Kazan, 1847). Blossfeld produced this textbook, as he explained, due to the different objectives in teaching forensic medicine to jurists versus physicians, and hence, the inconvenience posed by teaching the subject to both groups joint-



- ly (as was the practice in Germany and, as we will see below, in Kiev) or using the same text for both. Blossfeld (unknowingly, as he claimed) produced his textbook at the same time and with the same organization as German physician S. Bergmann's influential textbook of the same genre (Bergman prefaced his exposition of forensic medicine with a short popular introduction to anatomy and physiology). See S. Bergmann, *Medicina forensis für Juristen* (Baunschweig, 1846). On the German tradition, see K. Mittermaier, *Sud prisiazhnykh v Evrope i Amerike*, pod redakt. N. Lamanskii (St. Petersburg, 1865); and Johann Ludwig Casper, *Practisches Handbuch der gerichtlichen Medizin, nach eigenen Erfahrungen*, 2 vols (Berlin, 1857–1858), trans. as *A Handbook of the Practice of Forensic Medicine, Based upon Personal Experience*, 3 vols. (London, 1861–1864).
- 126 Blossfeld, "O vliianii sudebnoi meditsiny," p. 22.
- 127 Ibid.
- 128 Ibid., p. 23.
- 129 Ibid.
- 130 For a recent interpretation of the nobility as ruling class, see John P. LeDonne, *Absolutism and Ruling Class: The Formation of the Russian Political Order, 1700–1825* (New York: Oxford University Press, 1991).
- 131 Blossfeld, "O vliianii sudebnoi meditsiny," p. 28.
- 132 Frieden, *Russian Physicians*, p. 29. Frieden describes how, under Nicholas's reign, most medical practitioners continued to be of low origin, in spite of S.S. Uvarov's efforts to attract nobility to state gymnasia and universities during his tenure as minister of education from 1833–1849.
- 133 Blossfeld, "O vliianii sudebnoi meditsiny," p. 28.
- 134 Ibid.
- 135 Ibid.
- 136 Leonov, "O razvitii sudebnoi meditsiny," pp. 20–21.
- 137 Ibid.
- 138 Ibid.
- 139 The physician (like the rest of the public) interacted directly with the chancellery secretary (or scribe), who was the main actor in legal proceedings. Only in important criminal cases would the judge play the central role. Litigants and witnesses (including physicians) dictated their testimony to the secretary, who recorded it in "points" according to rules stated in Peter's final decree (1723) on court procedure, "On the Form of the Courts." *PSZ*, no. 4344, 5 November 1723. See Wortman, "Peter the Great and Court Procedure," esp. pp. 308–10; and Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*, p. 52.
- 140 Professors' engagement in forensic medical work dates back to 1746 when Peter ordered that all corpses stemming from sudden death, or from drunkenness, fights, etc. be sent for examination to his newly created anatomical theatres. The tradition of forensic medical work at universities that stemmed

from this decree operated as a parallel or “shadow” track to the official, codified system that from 1797 mandated district, city, and police physicians for the conduct of court-related duties. According to archival documents, there was an effort in 1864 to formalize this “shadow” system and the involvement of professors, but the Medical Council put the matter on hold in light of the impending judicial reform. The Council never returned to it. See RGIA, f. 1294, op. 6, 1864, d. 197.

141 RGIA, f. 1294, op. 6, 1835, d. 5.

142 Ibid., ll. 10–10ob.

## CHAPTER 2

### On the Cusp of Reform: Making the Expert Scientific

- 1 My analysis counters the standard picture of the “scientific expert” as the logical outcome of the grand march of scientific progress, that marched right into the courtroom (where, of course, it was then subject to judgment and deemed either “good” or “bad” science). See, for example, the special issue on “Science and the Law” in *Issues in Science and Technology* (National Academy of Sciences) 16/4 (2000). It also seeks to supplement accounts such as that of Roger Smith, who explains the physician’s role in court as the direct translation of two polar discourses: medical and legal. Smith posits and accepts these polar discourses as a priori and philosophically distinct, and takes this divergence as his starting point. By contrast, I take this divergence as my end point, and seek to explain the historical process by which the discourses of medicine and law diverged, and why. Smith, *Trial by Medicine*; and Roger Smith and Brian Wynne (eds.), *Expert Evidence: Interpreting Science in the Law* (London: Routledge, 1989). This chapter attempts to flesh out the historical contingency of each of these depictions.
- 2 Barbara J. Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton: Princeton University Press, 1983), esp. p. 167. On the empiricist tradition in medicine, and reliance on diagnostic signs, see Erwin H. Ackerknecht, *A Short History of Medicine* (Baltimore: Johns Hopkins University Press, 1982).
- 3 As Shapiro shows, the seventeenth century saw a new emphasis on the grading of evidence on scales of reliability and probable truth. In science, statements about the real world became probabilistic hypotheses. In law, an examination of the credibility of witnesses and a concern for truth beyond a

- reasonable doubt became the standard (in England). As she points out, there were striking overlaps between the vocabularies and methods found in law and science, as well as the actual persons employing these notions. One such “crossover” figure, who has received the lion’s share of historical attention, is Sir Francis Bacon, a central figure in the revolutionary new natural philosophy (also known as the scientific revolution), and a leading lawyer of his day, rising even to the post of Lord Chancellor. His approach to both law and nature was inductive, and he argued that one should remain close to the particulars of each. See Shapiro, *Probability and Certainty*, pp. 168–69. For more on how Bacon’s legal career shaped his approach to the study of nature, see Julie Robin Solomon, *Objectivity in the Making: Francis Bacon and the Politics of Inquiry* (Baltimore: Johns Hopkins University Press, 1998).
- 4 Esmein, *History of Continental Criminal Procedure*, pp. 622–23. In medieval German practice, proof by means of oath of judicial office “served for proof of facts which had *come directly to the perception* of the court” and “commonly consisted in the judge, together with two or six judgement finders, vouching for the disputed fact by express invocation of their oaths of office.” Engelmann, *History of Continental Civil Procedure*, p. 161.
  - 5 Medieval procedure in France and Germany included a similar formal proof. This preliminary proof (*corpus delicti*) was already required by the old “coutumal” laws of France (thirteenth century), but it was then “of a rude and formal character; it was necessary to exhibit to the judge the wound or corpse itself.” The first codified laws of Frieberg (1218–1220) stipulated that all 24 members of the court had to inspect wounds and corpses; legislation later in the thirteenth century reduced the number to two. Esmein, *History of Continental Criminal Procedure*, pp. 622–23; and Engelmann, *History of Continental Civil Procedure*, p. 161.
  - 6 For example, the French ordinance of 1670 specified the procedure by which a judge conducted an official inspection of the *corpus delicti* and recorded his findings in a legal report. Crawford, “Emergence of English Forensic Medicine,” p. 167.
  - 7 While historians have explained the reasons for this lag time (see Chapter 1), what is surprising is that the practice of judicial inspection appears before Peter I’s formal introduction of inquisitorial procedure. However, as Wortman has pointed out, inquisitorial process was already “widespread” in a more informal way before Peter came to power. See Wortman, “Peter the Great and Court Procedure,” p. 303.
  - 8 Meanwhile, however, other codes served other purposes or communities, illustrating what Kollmann describes as the “calculated decentralization” of Muscovite governance, evidenced also in legal practice. See Nancy Shields Kollmann, *By Honor Bound: State and Society in Early Modern Russia* (Ithaca, NY: Cornell University Press, 1999), p. 16 and esp. chapter 3.
  - 9 LeDonne, *Absolutism and Ruling Class*, p. 193.

- 10 In the seventeenth century, judges were military servitors sent from Moscow. In addition, provincial governors—who often were local figures—would sometimes simultaneously be judges, although in principle governors were not supposed to be appointed to their local communities. For more on judges in this period, see Kollmann, *By Honor Bound*, pp. 112–13. On judicial institutions and procedure, see S.I. Shtamm, “Sud i protsess,” in V.S. Nersesiants (ed.), *Razvitie russkogo prava v XV-pervoi polovine XVII v.* (Moscow, 1986), pp. 203–51; H.W. Dewey and A.M. Kleimola (trans. and eds.), *Russian Private Law in the XIV–XVII Centuries* (Ann Arbor: University of Michigan, 1973), pp. 41–48. The judge’s investigative role changes under Peter, who, via the Military Articles, put the police in charge of the investigation—a highly consequential move which, I would argue, contributed largely to the blurring of judicial and other state administrative functions prior to the reform. It was precisely on this point that Russia diverged in terms of judicial process from its European cohorts, who kept the investigation in the hands of investigative judges—not police. In Russia, this organization also left a bitter aftertaste associated with the inquisitorial, pre-trial phase that was retained under the judicial reform, in a way that the preliminary investigation did *not* in the other European countries (France, Germany) that retained a “mixed” system.
- 11 This preference was reflected in the abolition of general inquests in 1688 (a survey of a large body of witnesses in the community where the crime occurred). Kollmann, *By Honor Bound*, pp. 118–19. As we saw in the preceding chapter, Russia was almost three centuries behind the West in its transition from trial by “ordeals” to what Kaiser calls “formal evidence,” that is, the introduction of physical/material and written evidence. See Kaiser, *Growth of the Law*, pp. 152–63. As an example of how direct evidence in homicide cases operated in this period: the discovery of a corpse implicated in homicide those people on whose land the cadaver lay. Kaiser, p. 153.
- 12 Shershavkin, *Istoriia otechestvennoi sudebno-meditsinskoi sluzhby*, p. 51.
- 13 Ibid.
- 14 This original practice of judicial inspection, wherein the inspection was conducted at the scene where the body was found, carried into the practice of Russian physicians when they took over the task, and continued through the end of the nineteenth century. Reflecting the early century medical imperative of unmediated sensory perception, an intellectual rationale underlay this practice; in his instructions for the internal inspection (dissection) of a corpse, Berlin forensic physician J.L. Casper explained that “proper illumination is the most important requirement in this matter, artificial light being a most unsatisfactory substitute for daylight, because many things that we look for can only be recognized by their color, which is often materially altered in appearance by the nature of the light it is viewed in.” Casper,

*Handbook of the Practice of Forensic Medicine*, p. 208. Russian practice reflected both judicial custom and intellectual rationale. As one Russian physician observed in 1894, “the forensic-medical investigation of corpses usually took place at the location of the incident or place where the corpse was located, and therefore this type of *ekspertiza* is conducted under the most varied and at times impossible circumstances: in *banyas* and peasant huts, barely illuminated by daylight, in empty log cabins and sheds, and finally under the open sky, in courtyards, cemeteries ... private homes, etc.” A.I. Smirnov, “Prichiny neudovletvoritel’nago sostoiianiia sudebno-meditsinskoi ekspertizy,” in *Trudy V s’ezda obshchestva russkikh vrachei v pamiat’ N.I. Pirogov*, t. II (St. Petersburg), pp. 48–57.

- 15 Though these examples suggest the practice began earlier, the judicial inspection appears in Russian law as *lichnyi osmotr* (personal inspection) in 1782. (Whether this appeared somewhere in earlier law is unclear, as I have not come across any such references in imperial codes.) The original 1782 decree appeared in Russia’s first criminal code as Article 1191, under the rules of criminal procedure (1842). That article read: “[The] *lichnyi osmotr*, conducted at the place of the crime and confirming the fact of this event, has the same [legal] strength as the testimony of reliable outside [*postoronnykh*] individuals, when sufficient reasons for its refutation are not presented.” Appearing also in the judicial reform statutes, the *lichnyi osmotr* remained a staple of Russian criminal procedure throughout the imperial period. *Sudebnye ustavy 20 noiabria 1864 goda*, vol. II, *Ustav ugolovnogo sudoproizvodstva*, gl. 4, otdel. 1, arts. 315–35. For a monographic treatment of this procedural facet, see L.E. Vladimirov, *Uchenie ob ugolovnykh dokazatel’stvakh*, osob. chast’, kn. I. *Lichnyi sudeiskii osmotr i zakliucheniiia ekspertov* (Kharkov, 1886).
- 16 The common thread in this transition from judge to physician is the visual aspect of the activity. These shared legal and medical roots in “viewing” are reflected etymologically, in the legal terms that became attached to the judicial inspection (*osmotr*) and the physician’s examination and official documentation thereof (*akt omstra*, *svidetel’stvo*, *osvidetel’stvovanie*). These stem from the verbs *smotret’* (to examine, inspect) and *videt’* (to see).
- 17 This was no empty metaphor. This understanding of the physician’s role, derived from these procedural origins, persisted throughout the nineteenth century and can be heard in eminent jurist A.F. Koni’s 1893 expression of the idea that the judge uses the physician’s “sense organs,” insofar as the physician “conveys external impressions” to the judge. Koni, “O polozhenii vracha-eksperta na sude,” reprinted in *Zhurnal Spb-ogo Iuridicheskogo Obshchestva* 2 (1894): 148.
- 18 For the oath requirement in Europe, as stipulated in the Carolina (1532) in Germany, and the French Ordinance of 1670, see Crawford, “Emergence of English Forensic Medicine,” p. 198.

- 19 Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*, p. 212. The regulation appeared under point 22 in *Nastavlenie* (1829), and later in the Statute of Forensic Medicine (1842), kn. II, gl. I, art. 1325. Though all medical graduates who earned the basic medical degree of *lekar'* were subject to bureaucratic regulation, confusion persisted in practice as to whether non-service physicians (such as hospital physicians or university professors)—whom the police also often called upon for forensic dissections—were likewise subject to forensic-medical regulations. The resolution of such queries was, almost without exception, yes. RGIA, f. 1294, op. 6, 13 October 1842, d. 24, ll. 413–4180ob. See also Chervakov, Matova, Shershavkin, *150 let kafedry sudebnoi meditsiny 1-ogo Moskovskogo ordena Lenina Meditsinskogo Instituta (1804–1894)*.
- 20 The implications of this were myriad and lasting. First, this original judge-like status goes a long way to explaining why medical testimony would have initially received “full proof” status (an explanation for which I have yet to come across in the legal or historical literature). Second, these procedural origins shaped subsequent views of medical expertise. In Russia, in particular, this original judge-like status shaped post-reform arguments and attitudes towards the physician’s legal role and status; this deeply-rooted judge-like status contrasted sharply with the role slated for the expert as mere witness, which arrived as part of the imported package of English adversarialism under the reform (discussed in Chapter 5). The view of medical expert as judge lasted into Soviet thinking on this subject. See I.F. Krylov, *Sudebnaia ekspertiza v ugolovnom protsesse* (Leningrad: Izdatel'stvo Leningradskogo Universiteta, 1963).
- 21 Xavier Bichat (1771–1802) quoted in Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception*, trans. by A.M. Sheridan Smith (New York: Vintage Books, 1973), p. 165.
- 22 This orientation is reflected in attitudes within forensic medicine toward the microscope. Even at the end of the 1820s the microscope was shunned. For example, in their popular and wide-spread medical textbook *Manuel complet de médecine légale* (1836), J. Briand and E. Chaude discuss why one cannot use the microscope in forensic medicine, putting an emphasis on “color and smell.” The same view is reflected in the later text by Alphonse Devergie, *Médecine légale, théorique et pratique* (1840). In the section on blood stains the microscope is not mentioned at all, although at the same time under the investigation of semen stains Devergie states that the microscope can be very useful and can give clear results. Both French texts were widely used in Russia.
- 23 Foucault, *Birth of the Clinic*, esp. pp. 141–98. While not entirely consistent throughout his book, Foucault does in parts explain that the “empirical” or “medical gaze,” while rhetorically compelling in its simplicity, actually en-

- compasses the different sensory fields of sight, touch, and hearing. He also acknowledges, but does not delve into, the broader institutional and intellectual complex that contributed to and enabled the rise of pathological anatomy and “sensory knowledge”—that is, “the conjunction of a hospital domain and a pedagogic domain, the definition of a field of probability and a linguistic structure of the real.” Idem, p. 121.
- 24 On the decline of this “paradigm” in medicine, and the embrace of technical intermediaries such as the microscope, see L.S. Jacyna, “A Host of Experienced Microscopists”: The Establishment of Histology in Nineteenth-Century Edinburgh,” *Bulletin of the History of Medicine* 75/2 (2001): 225–53. With the improvement of the microscope, which was substantially free of its optical defects and technical glitches in the 1830s, Jacyna explains, vision in general and scientific vision in particular “lost its immediacy and innocence.” Others locate the shift in broader cultural terms, such as Jonathan Crary, who describes a nineteenth-century reorganization of vision. Jonathan Crary, *Techniques of the Observer: On Vision and Modernity in the Nineteenth Century* (Cambridge, MA: MIT Press, 1990).
  - 25 See Engelmann, *History of Continental Civil Procedure*, pp. 42 and 436; and Shapiro, *Probability and Certainty*, p. 174. In addition to the system of rational proofs discussed above, inquisitorial procedure also involved another layer of complex evidentiary rules which determined whether there was sufficient evidence to justify torture. They defined a system of *indicia*, *signae*, and *conjecturae* (presumptions) of various weights. (*Indicia* referred to facts that we would refer to as “circumstantial evidence.”) However, these “signs” and “indications” went only to the threshold question of torture and could not be considered at all in determining the guilt or innocence of the accused. No matter how compelling, they were not sufficient to convict (only proofs were).
  - 26 *USM* (1842), art. 1752, appearing originally in *Nastavlenie* (1829). Emphasis my own.
  - 27 *Ust. ugol. sudoproiz.*, art. 345. Under the new rules of procedure, this type of language fell under those articles which pertained to the physician’s activities in general (not limited to dissection).
  - 28 For the German-Prussian case, See Casper, *Handbook of the Practice of Forensic Medicine*, vol. I, pp. 83–94, esp. p. 92 on “Framing the Protocol and Report”; for the Austrian case, see Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*.
  - 29 See Shauenstein for a description of the sections of the Austrian written testimony/dossier document. It is almost identical to the Russian *Ustav Sudebnoi Meditsiny*.
  - 30 Ian Hacking, *The Emergence of Probability: A Philosophical Study of Early Ideas about Probability, Induction and Statistical Inference* (London: Cambridge University Press, 1975), esp. chapter 5.

- 31 On the roots of the concept of “fact” in the legal arena of the sixteenth century, see Barbara J. Shapiro, *A Culture of Fact: England, 1550–1720* (Ithaca: Cornell University Press, 2000); for a discussion of “legal facts” in the civil law system, in the context of the logical formalism that permeated nineteenth-century German legal science, see Merryman, *The Civil Law Tradition*, pp. 81–83.
- 32 Crawford, “Emergence of English Forensic Medicine,” p. 164.
- 33 Unlike Russia, this judicial/procedural reform was the by-product of revolutionary situations, in both France (1789) and Germany (1848). In this reform the basic rule of oral procedure was connected with the rule of the “*intime conviction*” (or moral persuasion) of the jurors, as opposed to statutory proofs and written procedure that were characteristic of the old regimes. For more on this transition, see Langbein, *Prosecuting Crime*; and A. P. Schioppa, *The Trial Jury in England, France, Germany, 1700–1900* (Berlin, 1987).
- 34 On chemistry, see Nathan Brooks, “The Formation of a Community of Chemists in Russia: 1700–1870” (PhD thesis, Columbia University, 1989); on veterinary pathology, see Leon Z. Saunders, *Veterinary Pathology in Russia, 1860–1930* (Ithaca, NY: Cornell University Press, 1980); on psychological biology, see Todes, “From Radicalism to Scientific Convention.”
- 35 For examples at the Kharkov University medical faculty, see I.P. Skvortsova and D.I. Bagaleiia (eds.), *Meditsinskii Fakul'tet Kharkovskago Universiteta za pervyia 100 let ego sushchestvovaniia (1805–1905)* (Kharkov: Izdanie Universiteta, 1905–1906), p. 76.
- 36 This recognition continued throughout the nineteenth century and into the twentieth. For this later period see, for example, Kendall E. Bailes, *Science and Russian Culture in an Age of Revolutions: V.I. Vernadsky and his Scientific School, 1863–1945* (Bloomington: Indiana University Press, 1990).
- 37 On the policies of Minister of Education S.S. Uvarov (1833–1849), see Cynthia H. Whittaker, *The Origins of Modern Russian Education. An Intellectual Biography of Count Sergei Uvarov, 1786–1855* (DeKalb: Northern Illinois University Press, 1984), esp. chapter 7. On education policy, see James C. McClelland, *Autocrats and Academics: Education, Culture, and Society in Tsarist Russia* (Chicago: University of Chicago Press, 1979); and Patrick Alston, *Education and the State in Tsarist Russia* (Stanford: Stanford University Press, 1969). This leniency towards medicine also extended to censorship policy. As Todes explains, the state’s censorship policy toward medical publications was exceptionally liberal, in keeping with the general policy of granting the medical community privileges withheld from other groups. Todes, “From Radicalism to Scientific Convention,” pp. 79–90.
- 38 The only exception to this embrace of Western study was an ebb, though not total halt, of foreign travel after the 1848 European uprisings, which led to restrictions on university enrollment and study abroad.



- 39 See, for example, McClelland, *Autocrats and Academics*; and Alston, *Education and the State*.
- 40 See Frieden, *Russian Physicians*, p. 35.
- 41 On the state measures, such as incentives via the Table of Ranks (in the second quarter of the century), to increase medical enrollment and retain graduates within the state medical service, see *ibid.*, chapter 2.
- 42 On the central government's efforts in the 1830s to upgrade and standardize medical education, and consolidate the medical occupation (by legitimizing practitioners with university degrees, and distinguishing them from graduates of hospital and surgical schools), see *ibid.*, pp. 28–30. Despite the state's ongoing efforts to increase the number of physicians, there remained a chronic need for them across the nineteenth century. As late as 1896, Russia had 16,400 physicians for a population of 92 million, a ratio of 9.2 physicians to every 100,000 inhabitants in European Russia, compared with 31.1 per 100,000 in France and 63.8 per 100,000 in England. E.F. Brokgauz and I.A. Efron, *Entsiklopedicheskii slovar'*, "Meditsinskii personal," vol. 18 (St. Petersburg, 1896), p. 895.
- 43 *Meditsinskii Fakul'tet Kharkovskago Universiteta*, p. 59.
- 44 *Ibid.*, pp. 29 and 251–54.
- 45 Pelikan was instructed to present a report about his activities every six months, but unfortunately no reports were sent. The Academy had little leverage to require him to do so upon his return, as there was already an elite government position awaiting him (vice director of the Medical Department of the Ministry of Internal Affairs). Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*, pp. 127–28.
- 46 On eighteenth-century noble culture, see Iurii M. Lotman, "The Poetics of Everyday Behavior in Eighteenth-Century Russian Culture," in Alexander D. Nakhimovsky and Alice Stone (eds.), *The Semiotics of Russian Cultural History* (Ithaca: Cornell University Press, 1985), pp. 67–94; and Marc Raeff, *The Origins of the Russian Intelligentsia: The Eighteenth-Century Nobility* (New York: Harcourt, Brace, & World, 1966).
- 47 *Meditsinskii Fakul'tet Kharkovskago Universiteta*, p. 50.
- 48 *Ibid.*, p. 61.
- 49 *Ibid.*, p. 58.
- 50 The medical academies and university medical departments were sensitive to this need. In order to ensure that its students would be able to read German books and journals, the Imperial Medical-Surgical Academy in St. Petersburg taught German as an obligatory course during the third and fourth semesters. N.P. Ivanovskii, *Istoriia Imperatorskoi Voenno-Meditsinskoi (byvshei mediko-khirurgicheskoi) Akademii za sto let 1798–1898* (St. Petersburg, 1898), p. 309.
- 51 *Zapiska o sostoianii i deistviiakh Universiteta Sv. Vladimira v techenii 1843–1844 uchebnago goda* (Kiev, 1845), pp. 12–19.

- 52 This can be seen by the teaching materials used by the sequential chairs of forensic medicine in the capital cities and provinces alike. At the newly founded Medical-Surgical Academy in Petersburg, the first chair, Gromov (1806–1837), read lectures based on J.D. Metzger, *Kurzgefasstes system der gerichtlichen arzneiwissenschaft* [Abridged System of Forensic Medicine] (Konigsberg and Leipzig, 1793; Gromov used the 1814 ed.), then used the text of the Bavarian, A. Henke (originally published 1812; Gromov used the 1828 ed.). Zablotski-Desiatovskii (1846–1852) used Schurmayer, *Rukovodstvo po teoreticheskomu i practicheskomu izucheniiu sudebnoi meditsiny*, trans. by Lovtsov, izd. Med. Dept. Military Ministry (1851). Pelikan (1852–1857) used Orfila (*Traité de médecine légale*, 4th ed., 1846); Devergie (*Médecine légale théoretique et pratique*, Paris, 1840); and Briand and Chaude (*Manuel complet de médecine légale, contenant un traité élémentaire de chimie légale*, 1851). Chistovich used Briand and Chaude (1858); Dambre; Devergie; (Prussian) Casper (*Practisches Handbuch der Gerichtl. Med.*, 1857 and 1860); and (Austrian) Shauenstein (1865 and 1869). An examination of faculty teaching materials at provincial universities (from the 1830s to the 1860s) reveals the same reliance on foreign texts, with the additional authors: Orfila, Friedreich, Shmalts, Tarde, and Maschka—as well as Shauenstein. On teaching at the St. Petersburg Medical-Surgical Academy, see Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*; and at Kharkov University, see *Meditsinskii Fakul'tet Kharkovskago Universiteta*.
- 53 Historians generally explain the ascendancy of German medicine by its emphasis on scholarship and laboratory science, which together produced a model of medicine as a scientific enterprise. According to the standard historiographical picture, by mid-century this “model” was beginning to supplant the era of “hospital medicine” of the previous quarter century, most fully realized in Paris, with its emphasis on the systematic following of “clinical material” from admission to *post-mortem*, and reliance on direct sensory data in naming and treating disease (as discussed above). On the institutional, ideological, and social factors that shaped German medicine, see W.F. Bynum, *Science and the Practice of Medicine in the Nineteenth Century* (Cambridge: Cambridge University Press, 1994), esp. chapter 4; Joseph Ben-David, *The Scientist's Role in Society: A Comparative Study* (Englewood Cliffs, NJ: Prentice Hall, 1971), chapter 7, “German Scientific Hegemony and the Emergence of Organized Science”; Arleen M. Tuchman, “From the Lecture to the Laboratory: The Institutionalization of Scientific Medicine at the University of Heidelberg,” in William Coleman and Frederic L. Holmes (eds.), *The Investigative Enterprise: Experimental Physiology in Nineteenth-Century Medicine* (Berkeley: University of California Press, 1988). On the influence of German laboratory medicine in relation to broader changes in medicine, see Charles E. Rosenberg, *The Care of Strangers: The Rise of America's Hospital System* (New York: Basic Books, 1987), esp. pp. 161–65.

- 54 Rosenberg, *Care of Strangers*, p. 174.
- 55 Erwin H. Ackerknecht, “Early History of Legal Medicine,” *Ciba Symposia* 11 (1950–51): 1296.
- 56 Catherine Crawford, “Legalizing Medicine.” This system for medical review was particularly well-pronounced and formalized in Germany; by 1600 it was common practice for courts in the German states to refer questions arising from medical examinations to universities to be resolved by the medical faculties. Under this procedure, called *Aktenversendung* (dispatch of the record), German medical professors were consulted in the system of judicial review in the same way as law professors.
- 57 Ibid., esp. pp. 104–5.
- 58 The episode is described by L. Breitenecker (1959) and quoted in Lesky, *Vienna Medical School*, pp. 555–56.
- 59 Shauenstein, *Lehrbuch der gerichtlichen Medizin* (1862).
- 60 Lesky, *Vienna Medical School*, p. 253.
- 61 Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*.
- 62 Shauenstein analyzed the works of J.L. Casper, I. Schurmayer, A. Devergie, A.A. Tardieu, J. Briand and E. Chaude, and A.S. Taylor.
- 63 Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, p. 46. Emphasis my own.
- 64 Ibid., p. 47.
- 65 Leonov, *O razvitii sudebnoi meditsiny*, p. 19.
- 66 Chatskin, “Neskol’ko zamechaniy,” p. xlv.
- 67 Ibid., pp. xlv–xlvi.
- 68 D.A. Kotelevskii, “Vstupitel’naia leksiia po predmetu sudebnoi meditsiny, chitannaia dlia iuristov,” *Varshavskiiia universitetskiiia izvestiia* 1 (1870): 63–75. A prosecutor has the special task of preparing dissections for anatomical demonstration.
- 69 For Gromov’s overview of the various divisions and hence understandings of forensic medicine, see Gromov, *Kratkoe izlozhenie sudebnoi meditsiny*, pp. 32–40.
- 70 “Zametka o zadache i oblasti sudebnoi meditsiny” (a reprint of an article by F.V. Bekker, a privat-docent of medicine in Bonn, Germany), *Zh. Min. Iust.* 3/X (1861): 192–99.
- 71 Johann D. Metzger in his 1814 text divided the section on hygiene and medical police in this fashion, but it was Henke (from Bavaria) in his 1828 work, who first organized a forensic-medical textbook according to this division. This remained the standard form for Austro-German forensic-medical texts throughout the nineteenth century, employed by leading figures in the field such as Casper (1858) and Shauenstein (1865), up through P. v. Kraft-Ebbing, *Forensic Psychopathology* (Vienna, 1892). The Russians adopted this same organization from the Germans—see Gromov (1832) as well as the next Russian text to appear after a long gap, V. Shtol’ts, *Rukovodstvo k*

*izucheniiu sudebnoi meditsiny, napisannoe dlia iuristov* (St. Petersburg, 1885).

- 72 For a discussion of how Continental writings on forensic medicine developed as a subspecies of the legal literature on proof and procedure, see Crawford, “Legalizing Medicine.”
- 73 The term is known in English law, but the idea of a “General Part” (*Allgemeiner Teil*) is basically Continental and has deep roots in the civil law tradition. There are traces of it in the natural law tradition (see, for example, early modern jurist Samuel Pufendorf, and especially philosopher and jurist Christian Wolff) and in the work of humanists such as jurists Johannes Althusius and Hugo Doneau. German legal scholars then made it a full-fledged, more extensive undertaking in the nineteenth century. In this context of German legal science, the general part contained general principles applicable to all legal situations, and the special part contained special rules applicable to subdivisions of legal reality. This approach to the organization of legal knowledge—from general to specific—has played and continues to play an important role in European thinking, primarily, about how to approach the structuring of major legislation. For a comprehensive analysis of German legal science, see Mathias Reimann, “Nineteenth Century German Legal Science,” *Boston College of Law Review* 31 (July 1990): 842–897. I am grateful to Nils Jansen for illuminating these earlier attempts to systematize the law on the basis of general ideas, which informed and influenced the later nineteenth-century discussions.
- 74 Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, pp. 3–47.
- 75 These two systems for evaluating evidence were not mutually exclusive in practice or chronologically. Both in France and Germany, the judge was left discretion in the matter of presumptions (circumstantial evidence). See Englemann, *History of Continental Civil Procedure*, pp. 44–46, and Langbein, *Prosecuting Crime*, pp. 59–60. Langbein argues that in France, already in the sixteenth and the seventeenth centuries, judges were allowed some discretion in the free evaluation of evidence, due to the introduction of punishments that fell short of the death sentence. Notwithstanding this earlier erosion of some of the more rigid aspects of the proof system, it was only with the French Revolution that the system of formal proof began to succumb in full, with the 1791 decree establishing the criminal jury and requiring the jurors to decide according to “*intime conviction*.” On this transition in other European countries, see Englemann, p. 46.
- 76 Hand-written course materials and lectures were not uncommon in this period, reflecting a chronic shortage of textbooks and the prohibitive cost of publishing.
- 77 “Sudebnaia Meditsina,” handwritten, St. Petersburg, 8 May 1866.
- 78 Ibid.; Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, p. 6.
- 79 V.A. Legonin, “Sudebnaia Meditsina,” izdanie studenta A. Tavrizova (Moscow, 1865–1866; handwritten).

- 80 F.V. Bekker, *Rukovodstvo k sudebnoi meditsine*, (1859/1869).
- 81 Zmeev, *Russkie vrachi pisateli*, pp. 173–74.
- 82 Carl Joseph Mittermaier quoted in Legonin, “Sudebnaia Meditsina,” p. 8.
- 83 There is a rich literature on the history of the “fact” and how it came to acquire the imprimatur of certainty. Much of the literature looks at the changing significance of the term in relation to the scientific enterprise, where it began as a “datum of experience” in the seventeenth century, and evolved into something demonstratively certain and revealing of the real contours of nature, that is, the ultimate forms of truth about nature, by the nineteenth century. In her lucid historical account, Lorraine Daston describes the various “mutations” of scientific factuality in the Enlightenment, from “strange facts” (of early seventeenth century) that described anomalies and novel phenomena and were not “steady” enough to serve as proofs—to “plain facts” (of the mid-eighteenth century) that could be compiled into inductive generalizations that applied to universals. In short, she looks at the transition of the “fact” as something that resisted explanation to something that constituted explanations. Lorraine Daston, “Strange Facts, Plain Facts, and the Texture of Scientific Experience in the Enlightenment,” in Suzanne Marchand and Elizabeth Lunbeck (eds.), *Proof and Persuasion: Essays on Authority, Objectivity, and Evidence* (Brepols, 1996), pp. 60–80. Important work has been done on how English natural philosophers of the seventeenth century produced “matters of fact” in conjunction with gentlemanly norms and practices by which “types of scientific knowledge were made and their credibility secured.” The groundbreaking work in this area is Steven Shapin and Simon Schaffer, *Leviathan and the Air-Pump: Hobbes, Boyle, and the Experimental Life* (Princeton: Princeton University Press, 1985). Shapin and Schaffer’s work is broadly inspired by Ludwik Fleck’s classic monograph, *Genesis and Development of a Scientific Fact* (Chicago: University of Chicago Press, 1979).
- 84 See Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, esp. pp. 1–45, and on relevant articles from Austrian penal code, pp. 12–13.
- 85 Emphasis my own. Prussian Code of Criminal Procedure, art. 168, and Regulations, arts. 19–21. In Prussia, all existing statutory regulations (regarding forensic medicine) were collected by the Royal Scientific Commission for Medical Affairs in their Report of 15 November 1858, recognized as universally obligatory, and published in the Ministerial Rescript, dated 1 December 1858. Casper, *Handbook of the Practice of Forensic Medicine*, vol. I, pp. 85–86.
- 86 Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, pp. 4–5. Emphasis my own.
- 87 Ibid., pp. 4–5.
- 88 Ibid. Shauenstein discusses this topic under the heading of “About judicial evidence by means of knowledgeable people [*sveduiushchie liudi*].”

- 89 This is not to say that “science” (*nauka*) and “logic” did not exist or play a role in the description and understanding of forensic medicine in earlier Russian literature. Indeed, these two types of knowledge were evoked and presented as the pillars of the field in Gromov’s 1832 text. What was different, however, is that they were not so aligned, counterpoised, and divvied up into medical and legal terrain. This earlier, “unified” understanding of science and logic has deep historical roots; as Shapiro describes, logic and science were interdependent modes of knowledge in classical learning, and logic was thought to yield demonstrative (or scientific) knowledge. These close-knit historical roots are reflected in the fact that logic was part of the medical curriculum in Russia up to the early 1860s. *Meditsinskii Fakul’tet Kharkovskogo Universiteta*, p. 61. On the original interdependence of the spheres of logic and scientific knowledge, dating back to the Greco-Roman world, see Shapiro, *Probability and Certainty*, p. 163.
- 90 Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, p. 110; Legonin, “Sudebnaia Meditsina,” p. 7.
- 91 Bellin, “Ocherk uslovii deiatel’nosti,” p. 170. Emphasis as in original.
- 92 See Englemann, *History of Continental Civil Procedure*, p. 44, note 8. As we have seen, the entire system was geared toward ensuring the certainty of legal judgments. Within the scale of arithmetical values, which operated on a scale of certainty, “full proof” status (enjoyed exclusively by medical testimony and confession)—by itself was sufficient to determine legal judgments. Since legal judgments were predicated on certainty, infallibility was necessarily presumed in those forms of testimony with full proof status. Confession and medical knowledge, thus, were viewed as infallible paths to the truth.
- 93 *Razbor zamechatel’neishikh ugovnykh protsessov noveishago vremeni, v sviasi s izlozheniem uspekhov psikhiiatrii i sudebnoi meditsiny izlozhenno po poslednim rabotam C.J.A. Mittermaier, Sovremennoe polozhenie suda prici-azhnykh*, trans. by N. Lamanskii (St. Petersburg, 1865), pp. 3–4.
- 94 Engelmman, *History of Continental Civil Procedure*, pp. 41–42. “Positive dogma and its scholastic development ruled both theology and law. To allow free play to the individual conviction of the judge would have been as impossible as to allow individual freedom in religious thought.” Endemann, “Die Beweislehre,” p. 26, cited in Engelmman, p. 41, note 5. Basically, there were two orders of proofs: “those which the law appoints to be held as certain, and those whereof the effect is left to the discretion of the judge.” Medical testimony fell within the former category. Quotation cited by Engelmman, p. 44, note 8.
- 95 Sir William Osler (1849–1919) was a Canadian by birth, who for many years was active in the United States.
- 96 See Shapiro, *Probability and Certainty*.
- 97 This echoes Casper’s (1860) critique of his predecessor Henke’s “armchair” textbook of forensic medicine. Casper, *Handbook of the Practice of Forensic*

- Medicine*, vol. I., Thanatological Division, p. vii. Casper (1796–1864) was a professor of forensic medicine in the University of Berlin, a forensic physician to the Court of Justiciary of Berlin, and a member of the Royal Central Medical Board of Prussia.
- 98 Legonin, “Sudebnaia Meditsina,” p. 6. Emphasis as in original.
- 99 Ibid. Emphasis as in original.
- 100 Ibid.
- 101 Casper, *Handbook of the Practice of Forensic Medicine*, vol. I, p. vi. Emphasis my own.
- 102 Ibid., p. vii. Casper compared the medical expert to the physician at the sick bed.
- 103 Simonich, “Sudebno-meditsinskaia ob’ektivnost’,” *Arkhiv sud. med.* 3 (1867): 154–84.
- 104 Ibid., p. 157.
- 105 Ibid.
- 106 See Langbein, *Prosecuting Crime*; Esmein, *History of Continental Criminal Procedure*; and Engelmann, *History of Continental Civil Procedure*.
- 107 Mirjan R. Damaska, *Evidence Law Adrift* (New Haven: Yale University Press, 1997), p. 21. On the broader political reasons for the transition to this “free proof” principle (and assault on the Roman-canon law of proof), particularly in relation to the French Revolution, see Damaska, pp. 20–25.
- 108 On the English approach to evidence, see Schioppa, *Trial Jury in England, France, Germany*, esp. pp. 33–39; Damaska, *Evidence Law*, esp. chapter 1; and Damaska, “Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study,” *University of Pennsylvania Law Review* 121/1 (1972): 506–89.
- 109 As Damaska points out, it is only in the first decade of the twentieth century that exclusionary rules became an object of serious study on the Continent. Damaska, *Evidence Law*, p. 22.
- 110 On the absence of any rules of evidence in the Russian judicial reform statutes, in keeping with the French and as such, deviating from the English, see N.A. Butskovskii, *O prigovorakh po ugovornym delam, reshaemym s uchastiem prisiazhnykh zasedatelei* (St. Petersburg, 1866), esp. pp. 27–31.
- 111 Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*, p. 2.
- 112 Ibid., p. 46.
- 113 Ibid.
- 114 Ibid.
- 115 Simonich, “Sudebno-meditsinskaia ob’ektivnost’,” p. 160.
- 116 RGIA, f. 1294, op. 6, 1 September 1864, d. 216, ll. 543–543ob. “About the incorrect conduct of forensic medical dissections and chemical investigations at the Institute of the Imperial Medico-Surgical Academy.” Reflecting the expansive discretion and access granted to physicians in the pre-reform period (something that changes under the reform), the Medical Department

- reminded that physicians “should keep in mind not only that which is presented in the protocol (*protokol*) of the dissection, but also all the circumstances discovered by police and investigators....”
- 117 Pelikan, “O znachenii estestvennykh nauk.” For comments from a later period in a similar vein, see Bellin, “Ocherk uslovii deiatel’nosti.”
- 118 Simonich, “Sudebno-meditsinskaia ob’ektivnost’,” pp. 156–57.
- 119 Ibid., p. 157.
- 120 Ibid., pp. 156–57.
- 121 Ibid.
- 122 Ibid., p. 171. With regard to these comments, Simonich cites particular articles (arts. 342–43, 345) from the reformed code of criminal procedure. *Sudebnye ustavy 20 noiabria 1864 goda*, vol. II, *Ustav ugovnogo sudoproizvodstva* (St. Petersburg, 1867; hereafter *Ust. ugol. sudoproiz.*).
- 123 This type of public dispute among academic physicians, which aired in specialized and general newspaper and journals, was not an anomaly. Legal cases involving medical testimony became an occasion and platform for physicians to play out academic rivalries or scientific disputes. It was no coincidence that many of the sensational cases and *cause célèbres* of nineteenth-century Russia included the participation of medical experts (such as the Bielis and “Multanskoe” cases); indeed, one contemporary legal commentator suggested that it was precisely the publicity generated from these medical squabbles that transformed a given criminal case into a sensational one. See V. Ia. Fuks, “Ugolovno-sudebnaia ekspertiza na predvaritel’nom sledstvii i sude,” *Zhurnal grazhdanskogo i ugovnogo prava* 17/4 (1887): 21. On the flipside, Chief Procurator A.F. Koni noted in his memoir *Na zhiznennom puti* (St. Petersburg, 1912) that these medical polemics were often exploited by the parties of cases.
- 124 On the “pro-insanity” side, V. was diagnosed as suffering from “*umopomeshatel’stvo*, *beshenstvo* [fury], *mania-vesania*.” On the Russian classification of insanity, see I.F. Riul’, *Proekt ustava dlia sanktpeterburgskago doma umalishennykh* (St. Petersburg, 1832), pp. 19–29; and Kenneth S. Dix, “Madness in Russia, 1775–1864: Official Attitudes and Institutions for its Care” (PhD thesis, University of California at Los Angeles, 1977).
- 125 The case played out in multiple articles of attack and counterattack. In sequence: M. Sokolov, “*Umopomeshatel’stvo*, priniatioe za prityvorstvo, i prisuzhdenie bol’nago k smertnoi kazni,” *Arkhiv sud. med.* 2 (1867): 1–39; Ergardt, “*Universitetskie Izvestie*,” 6 (Kiev, 1867), later reprinted as “*Pritvorstvo*, priniatioe za *umopomeshatel’stvo*” in *Arkhiv sud. med.* (September 1867); at this point Simonich entered the fray, with “*Sudebno-meditsinskaia ob’ektivnost’*,” followed by Sokolov’s parting shot, “*Otvét Professoru Universiteta sv. Vladimira, g. Ergardt*,” *Arkhiv sud. med.* 4 (1867).
- 126 Heretofore Western historians have tended to focus on Russian physicians who worked outside of the central administration, building their analyses



around a specific type of practice to the exclusion of the full range of medical-service duties that comprised the working life of a Russian state physician. Frieden, for example, states that “publicly employed physicians, especially *zemstvo* physicians, shaped the dominant ethos of the profession.” Frieden, *Russian Physicians*, p. 17. However, Frieden’s study concentrates on *zemstvo* medicine to the exclusion of other types of “publicly employed physicians” and types of medical careers, notwithstanding the fact that *zemstvo* physicians were a “new” segment of the occupation, compared to other state physicians (being a by-product of the 1864 *zemstvo* reform, which created a new set of local organs of self-government called the *zemstvo*). In their early years, by the end of the 1860s, *zemstvos* assumed the “economic management” of 600 physicians (only 6% of the occupation). And even as late as 1889, when *zemstvo* medicine was in full swing, only 14.5% of the occupation worked for *zemstvos*, while 40.2% were in government employment (19.2% in civilian service; 21% in the military). V.I. Grebenshchikov, “Opyt razrabotki rezul’tatov registratsii vrachei v Rossii,” *Spravochnaia kniga dlia vrachei* (St. Petersburg, 1890), vol. 1, pp. 105–6; and Frieden, *Russian Physicians*, p. 75. Notwithstanding Frieden’s skewed sample, Western historians in subsequent works (up to the present) typically base their discussions of the Russian medical profession on Frieden’s conclusions.

127 Sokolov, “Umopomeshatel’s tvo,” pp. 8–13 and 20–21.

128 V.’s crimes fell under articles 96–97 and 104 kn. 1 (izd. 1859), which stated the following: article 96: “The combination [of circumstances] increases the guilt of the criminal. This happens either when the criminal committed several times one and the same crime, not being punished for the others earlier; or when he at different times committed different crimes, not punished previously for them; or when in one act different crimes are combined.” Article 97: “The repetition of one and the same crime increases the guilt of the criminal. The repetition of a crime is considered that, when the criminal, being punished for a crime, committed the same [crime] a second, or third time.” Article 104: “The raising of hands or weapons against an official authority [*nachal’nik*] is punished by death.” Sokolov, “Umopomeshatel’s tvo,” p. 21.

129 Ibid., p. 39.

130 Daston, “Objectivity,” p. 601.

131 Simonich, “Sudebno-meditsinskaia ob’ektivnost’,” p. 171.

132 Ibid., p. 58. For discussion of other similar cases, see the proceedings of the meeting of the society of Russian physicians in St. Petersburg, *Protokoly zasedanii obshchestva Russkikh vrachei v S.-Peterburge 1863–64* (St. Petersburg), pp. 277–306; and *Voenno-meditsinskii zhurnal* 4 (1867): 42.

133 On the details of these earlier examinations, see Sokolov, “Umopomeshatel’s tvo,” pp. 11–17. The results were mixed. As their overall conclusion, the provincial Medical Section found that V. “did not suffer from the disorder of his mental faculties” and all the “recklessness of his acts and behavior arise

from intentional simulation, with the goal of avoiding punishment.” There were, however, two dissenters: The *akusher* (medical assistant in child delivery), a member of the provincial Medical Section, found reason for doubts concerning V.’s mental condition; and the *ordinator* (hospital physician) diagnosed him as “feeble-minded.” It was the latter who suggested that V. be sent to [Ergardt’s] forensic-medical section of the Kiev Military Hospital for “new and thorough testing ... under the supervision of a professor of forensic medicine.” *Ibid.*, p. 15.

- 134 Letter of 4 February 1865, cited in Sokolov, “Umopomeshatel’s tvo,” pp. 18–19. Notwithstanding this brusque dismissal of “repeat simulators” (including V.), archival documents indicate that Ergardt was not averse to examining arrested examinees in principle, and indeed sought to improve the effectiveness of such forensic examinations based on contemporary medical thinking about mental illness, which included a blend of physical, behavioral, and hereditary explanations of causation. For this reason, in this same period, Ergardt appealed to the Medical Council in St. Petersburg requesting that for all individuals sent to his clinic “for the investigation of their mental faculties [*umstvennye sposobnosti*],” a special “program” of information about their previous condition be provided (and required). He provided a list of twenty questions (about family relations, personal habits, family history of nervous illnesses, sudden changes in character, any recent falls from high places, etc.) that were to constitute this “program” of information. See RGIA, f. 1294, op. 6, 25 August 1864, d. 197, ll. 475–480. “O programma, po kotoroi dolzhny byt’ predstavliaemy svedeniia o litsakh prisylaemykh dlia ispytaniia v Sudebno-meditsinskoe Otdelenie Kievskago Gospitalia.”
- 135 Sokolov, “Umopomeshatel’s tvo,” p. 20.
- 136 Unlike professor Ergardt, the court received information about all prior examinations (as these examinations were also administrative procedures), which reflected the gamut of opinion.
- 137 *Vysochaishe utverzhdannym polozheniem o voenno-okruzhnykh upravleniakh*, art. 231. *Ibid.*, p. 23.
- 138 After graduating from the Moscow Medical-Surgical Academy in 1830, and achieving his *doktor* of medicine degree in 1848 from the St. Petersburg Academy, Nikanor Petrovich Evfanov (1811–1870) worked as a military physician in Moscow, St. Petersburg, and Finland. Though a military physician, his career bore all the hallmarks associated with academic positions, including a two-year trip abroad with a “scientific/scholarly” goal, participation in medical societies, and a respectable publishing record. He became inspector of the Kiev military district one year before his involvement with the Val’chenko case. Zmeev, *Russkie vrachi pisateli*, vol. I, pp. 101–2.
- 139 From the inspector’s report of 28 July 1865, cited in Sokolov, “Umopomeshatel’s tvo,” pp. 26–27.
- 140 *Ibid.*

- 141 Ibid., p. 25. With regard to the outcome, both V. and his case languished under a string of ill-fated medical commissions, which again, pulled Ergardt into conflict with the official side of the case. Initially, the inspector called for a commission of four physicians (representing different institutional-administrative bases) to examine V., including one from Kiev's University sv. Vladimira (where Ergardt was on the faculty). Ergardt refused to participate, and the medical faculty thus declined this official request, stating that they had no other "specialist" in forensic medicine. Finally, a commission of three state physicians was formed (two military, and one civilian from the Ministry of Internal Affairs) and assigned to examine V. for an extended period of time, during the course of which V. fell ill and died.
- 142 Ibid., p. 7. Sokolov was not unique in this regard. It was precisely those state physicians who worked in Siberia, who typically were most outspoken regarding punishment-related medical issues (such as overseeing corporal punishment), as these physicians dealt most exclusively with convicts, who comprised the Siberian exile population. See Surkov, "Sudebno-meditsinskie sluchai v Simbirskoi gubernii, v 1860–1864 godakh," *Arkhiv sud. med.* 2/1 (1866): 8–27. See also Abby Schrader, *Languages of the Lash: Corporal Punishment and Identity in Imperial Russia* (DeKalb: Northern Illinois University Press, 2002); and Alan Wood (ed.), *The History of Siberia: From Russian Conquest to Revolution* (London: Routledge, 1991).
- 143 Sokolov, "Umopomeshatel'stvo," p. 36.
- 144 Ibid.
- 145 Sokolov worked in Tobol'sk from 1857 to 1862. For biographical information on M. Sokolov, see Zmeev, *Russkie vrachi pisateli*, vol. I, p. 112.
- 146 Conviction of mentally ill offenders was a common problem, as Sokolov saw it, due to the "ignorance of psychiatry" among the Medical Board physicians, and because judges did not consider a defendant's mental condition (even when no other motives were found). As a remedy, Sokolov recommended including local physicians from outside of the Medical Board for the examinations. "Umopomeshatel'stvo," pp. 1–2. As Sokolov identifies in his various writings, prior to the judicial reform this situation was structured in large part by the judicial-administrative system. In the pre-reform period, official examinations of the insane were conducted by members of the medical boards (*upravy*) within provincial governments (*pravlenie*), and in Siberia, general provincial administrations (*upravlenie*). When these examinations pertained to criminal cases, the Medical Board's conclusion was effectively (and legally) the final word on mental condition and hence the responsibility question. If the Medical Board found the accused to be not insane, the question of mental condition, as a rule, did not arise once the case returned to the courts (unless an appeal was made), largely because the question of responsibility (*vmeniiaemost'*) did not factor into the question of

guilt before the reform (which instead, as elaborated above, focused on the fact of the crime [*corpus delicti*]). In other words, pre-reform “guilt” did not include a *mens rea* component (that the deed must be preceded by a certain mental state) as English law did in this period, and long had. (See Smith, *Trial by Medicine*) Consequently, there was little to no attention to the *lichnost*’ (personality) of the defendant. After the reform, the question of a defendant’s capacity to be legally responsible became one of the three components of guilt, to be decided by the jury according to their “conscience”; this new definition of guilt pulled the question of mental condition into the court proceedings in a central way and, consequently, thrust the spotlight on the physician’s role and psychiatric explanations of criminal behavior. For a discussion of this changing relevance of *nevmeniaemost*’ (legal non-responsibility) with the advent of the judicial reform, see A. Liubavskii, *Russkie ugovnyye protsessy: t. III Kazuistika dushevnykh boleznei* (St. Petersburg, 1867), Introduction. On the Medical Boards’ obligations regarding the examination of the insane, see *Ustavy Blagochiniia* (1842), chast’ II, kn. 1, otd. 2, V., “O predmetakh po sudebnoi meditsine,” art. 36. The rules that guided the examination itself, cross-referenced in the *Ustavy Blagochiniia*, are defined in *Zakonov Grazhdanskikh*, arts. 340–43.

- 147 Sokolov injected his views on this social issue in his other publications; see, for example, his review of Liubavskii, *Russkie ugovnyye protsessy: t. III Kazuistika dushevnykh boleznei*, in *Arkhiv sud. med.* 1/3 (1867).
- 148 Sokolov, “Umopomeshatel’stvo,” p. 36.
- 149 Ibid.
- 150 Ibid.
- 151 Charles E. Rosenberg (ed.), *The Origins of Specialization in American Medicine* (New York: Garland Pub., 1989), Introduction. The classic formulation of the factors relevant to the development of special practice is found in George Rosen, *The Specialization of Medicine with Particular Reference to Ophthalmology* (New York, 1944); see also Rosenberg, *Care of Strangers*, esp. pp. 169–71. The twentieth century is covered in greater detail by Rosemary Stevens, *American Medicine and the Public Interest* (New Haven: Yale University Press, 1971).
- 152 Rosenberg, *Origins of Specialization*, Introduction. The most stark formulation of and reliance upon the medical “marketplace” as an interpretive framework is found in Paul Starr, *The Social Transformation of American Medicine* (New York: Basic Books, 1982), who explains the development of the American medical profession in terms of market forces. For other historical accounts that consider the economic context of the rise of and reaction to specialism and specialization, see Rosenberg, *Care of Strangers*; and from a comparative perspective, George Weisz, “Medical Directories and Medical Specialization in France, Britain, and the United States,” *Bulletin of the History of Medicine* 71/1 (1997): 23–68.

- 153 Wirtschafter, *Social Identity in Imperial Russia*, p. 96. As she describes, “this served well the requirements of a peasant society that failed to distinguish traditional from modern modes of medicine and thus consulted physicians, medical orderlies (*feldshers*), nuns, monks, faith healers, believing each was useful in a different way.”
- 154 Heretofore, historians of Russian science have discussed censorship of medical works in terms of an ideological face-off between the “autocracy” versus scientists, physicians, and the free expression of their ideas (framed as idealism versus materialism). See, for example, Todes, “From Radicalism to Scientific Convention,” esp. chapter 2, “Biological Psychology and the Tsarist Censor: the Dilemma of Scientific Development,” pp. 68–132. However, when one looks beyond that handful of exceptionally controversial works, such as Sechenov’s *Reflexes of the Brain* (St. Petersburg, 1866), to those of relatively unknown medical authors writing on less “charged” subject matter, one finds a more complicated (less black and white) picture of the intent and “sides” of censorship, wherein physicians (albeit highly placed) operated the levers of censorship on behalf of state interests, while simultaneously buttressing their own type of medical authority.
- 155 RGIA, f. 1294, op. 6, 1 Sept. 1864, d. 218, ll. 548–548ob. “O propuske k napechataniiu rukopisi G. Turachka o gomeopatii.”
- 156 Ibid., ll. 549ob–550.
- 157 Ibid., l. 549ob.
- 158 See Roderick E. McGrew, *Russia and the Cholera, 1823–1832* (Madison: University of Wisconsin Press, 1965). According to McGrew, during Russia’s first cholera epidemic the government imposed rigid quarantine measures, contributing to a wave of fear and triggering episodes of mass violence directed at “the military, the police and administrative officials.” McGrew, “The First Russian Cholera Epidemic: Themes and Opportunities,” *Bulletin of the History of Medicine* 36 (1962): 241. Russia’s response was not unique when cholera struck Europe for the first time in the 1830s; on popular and governmental responses of other affected nations, see Charles E. Rosenberg, *The Cholera Years: The United State in 1832, 1849, and 1866* (Chicago: University of Chicago Press, 1962).
- 159 RGIA, f. 1294, op. 6, 1 Sept. 1864, d. 218, ll. 550–550b.
- 160 Ibid., l. 551.
- 161 This is not to say that Sokolov was a big supporter of Medical Boards; on the contrary, he saw them a “useless formality” because they blindly deferred to specialists’ opinions, and, moreover, the physicians who staffed them were “ignorant of psychiatry” in their own right. To remedy this, he suggested an inter-administrative commission that would include specialists, but as only one of several types of physicians “from different administrative-authorities” (*vedomstvo*)—thereby benefiting from specialist knowledge, but keeping authority corralled within an official administrative body.

- 162 Heretofore historians have located Russian physicians' quest for authority in their efforts to gain political voice and/or the organizational forms associated with Western-style professional development. Laura Engelstein argues that Russian medical professionals prior to 1905 were politically powerless and as such identified more with the socially marginal groups they treated (especially women and peasants) than the monopoly of state power from which they were barred. She contends that it was physicians' sociopolitical location—that is, their peculiar combination of disenfranchisement and liberal values—that shaped their reception of imported medical ideas about deviance, and politicized their professional discourse. Engelstein, *Keys to Happiness*. From a different angle, Frieden describes the organizational and ideological emergence of a coherent "medical profession," for whom the motivating force and guiding objectives were autonomy and the appurtenances of Western-style professionalization. Frieden, *Russian Physicians*. That Frieden focuses on a segment of the occupation (*zemstvo* physicians) which functioned outside of the central bureaucratic-administrative structure—and, significantly, did not even exist until the 1870s and 1880s—contributes to her interpretation. These interpretations fit more generally within the received depiction of Russian professions as locked in a dance with the tsarist state in a perpetual, group-defining struggle for autonomy vis-à-vis arbitrary, restrictive interventions. As an exception, Benjamin Nathans' work on the legal profession complicates this standard historiographical view: see Nathans, *Beyond the Pale: The Jewish Encounter with Late Imperial Russia* (Berkeley: University of California Press, 2002), esp. chapter 9.
- 163 *Meditsinskii Fakul'tet Kharkovskago Universiteta*, p. 62.
- 164 To put these salaries into perspective, a modest annual budget of living expenses in 1867, as proposed by a contemporary physician, was 1,790 rubles per year. P.R., "Glasnyi sud i vrachi-eksperty," *Arkhiv sud. med.* 4 (1867): 7. During his tenure as chairman of the Medical Council (1873–1884), E.V. Pelikan in 1876 raised the salaries of inspectors (to 1,800 rubles) and district/city physicians (to 920), but the proportional disparities remained the same, with professors in a distant first place, along with members of the Medical Council and Medical Department of the Ministry of Internal Affairs. On medical salaries, see Frieden, *Russian Physicians*, pp. 46–49 and 215. Needless to say, the average state physician's salary paled by comparison to other occupations with similar educational investment, such as jurists, or those administrators (provincial *zemstvo* officials) who held positions of authority over physicians. See *idem*, pp. 212–13. While Frieden concentrates on how low the average physician's salary was vis-à-vis other occupational groups, she does not consider how disparities *within* the medical occupation played out.

- 165 For the breakdown of academic salaries (for the different professorial titles and lower academic posts), see *Meditsinskii Fakul'tet Kharkovskogo Universiteta*, p. 62.
- 166 Teaching of psychiatry was formally included in medical curricula from the 1830s, and the first department opened in 1857 in St. Petersburg, half a century after the department of forensic medicine. See F.S. Tekut'ev, *Istoricheskii ocherk kafedry i kliniki dushevnykh i nervnykh boleznei pri imperatorskoi voenno-meditsinskoi akademii* (St. Petersburg, 1898), p. 13; Dmiitrii D. Fedotov, *Ocherki po istorii otechestvennoi psikiatrii* (Moscow, 1957), chapter 1; and Brown, "Professionalization of Russian Psychiatry."
- 167 This occupational norm is evidenced in the biographical sketches of medical faculties of Kharkov, Kiev, St. Petersburg, and Moscow Universities. This phenomenon continued until the end of the imperial period; for career and biographical data for this later period, see *Rossiiskii meditsinskii spisok* (St. Petersburg/Petrograd, 1890–1916).
- 168 To be sure, these different "title" tracks complicate the picture somewhat—as the law employed categories differently than practitioners did at mid-century. Russian medical occupation and careers were structured in strict grid-like fashion, according to parallel and hierarchical "troikas" of degrees and titles (*zvanie*). Under the rubric of medicine, broadly understood, there were three categories of "scholarly" (*uchenyia*) degrees and titles, all of which were obtained by state-regulated testing. These three categories included medical, pharmacy, and veterinary. The "medical" category broke down further into three different tracks, each with its own hierarchy of three titles. 1) Scholarly-practical: a) *lekar'*; b) *doktor* of medicine; and c) *doktor* of medicine and surgery. 2) Scholarly-service: a) district physician; b) members of a medical board (*akusher* and surgeon [*operator*]); and c) inspector of a medical board. 3) Special-practical (*spetsial'no-prakticheskii*): a) tooth physician (*zubnoi vrach*); b) dentist (*dantist*); and c) midwife. As this intricate system of titles and degrees demonstrates, the simple term "physician," while applicable in the Anglo-American system, belies the complexity, stratification, and tensions of the Russian medical landscape. *Svod zakonov*, vol. 13 (1892), pt. 6, "Ob ispytanii lits, posviashchaiushchikh sebia sluzhbe po meditsinskomu vedomstvu ili praktike vrachebnoi," art. 586. In general, the first track ("scholarly-practical") were academic degrees; the second track were service titles that signified a post within state service, *but* they also required corresponding academic degrees. For the specific content of the testing for each of the degrees and titles, see *idem*, arts. 1–35, *prilozhenie k art. 596*.
- 169 On the founding of the clinic, the first of its kind at home and abroad, by Professor of Forensic Medicine Ia.A. Chistovich, see Evropin, *Istoricheskii ocherk kafedry sudebnoi meditsiny*, pp. 158–62. In his proposal to Academy

authorities, besides citing the benefits of practical training in medicine (an accepted view in this period), Chistovich also presented objectives reflecting the unique hybrid nature of forensic medicine, proposing that such a clinic would “imperceptibly introduce the desired uniformity and correctness in the conduct of forensic-medical cases; demonstrate the significance of state orders dispersed in different parts of our legislation; and instill the necessary respect and love of legality in young people, from their very entry into the service field.” Idem, p. 161. In the same year (1857), the “insane” ward of the same hospital was put under the control of I.M. Balinskii, the newly-appointed head of the newly-created *kafedra* of psychiatry at the St. Petersburg Medical-Surgical Academy—also to give students practical experience with the insane (a shift from the previous theoretical focus of instruction in the subject). Brown, “Professionalization of Russian Psychiatry,” p. 75.

- 170 Ergardt went abroad first in 1860 for 6 months (prior to being named a chaired professor); in 1864 for two months to participate in congresses of psychiatrists and naturalists (*estestvoispytatelei*); and in 1876, for three and a half months. Career information is from *Biograficheskii slovar' universiteta sv. Vladimira*, pp. 782–84.
- 171 Thus forensic medicine gained a foothold in the clinical study of the “insane” at roughly the same time as did the younger academic discipline of psychiatry. Although Chistovich took credit for the first forensic-medical clinic, stirrings for such a clinic actually began earlier by professor of forensic medicine I.A. Sviridov, at Kharkov University. In 1853 he began petitioning, via his medical faculty, to be allowed to conduct lessons and “demonstrate” mentally deranged (*umopomeshannye*) patients in the hospital of the provincial Departments of Social Welfare (*Prikazy obshchestvennogo prizreniia*), established by Catherine II in 1875, as part of a series of reforms intended to decentralize certain aspects of the administration of the empire. The *prikazy* were given responsibility for the provision of a variety of educational, medical, and charitable services—among them, the care of the insane. Sviridov finally received permission in 1861, after eight years of lobbying, and on certain conditions established by the Kharkov Medical Board, whose permission was also necessary. *Meditsinskii Fakul'tet Kharkovskogo Universiteta*, pp. 45–53. The effort to obtain clinical space for forensic-medical study of the insane continued into the reform era. On the development of the institutional care of the insane, see M.Ia. Grebliovskii, *Trudovaia terapiia psikhicheskii bol'nykh (razvitiie, sostoiianie, perspektivy)* (Moscow, 1966); and Brown, “Professionalization of Russian Psychiatry.”
- 172 Sokolov's first article (1845) was on a psychiatric topic (“Single-subject insanity”), but as a whole, his topics varied, ranging from cholera (1849) to “illnesses in the infirmary of the second battalion” (1851) to “hypertrophy of the spleen” (1852). Ergardt's topics included “cause of death” cases, infanti-



- cide, insanity in criminal cases, and general commentaries about forensic medicine in Russia. For biographical and career data on Sokolov, see Zmeev, *Russkie vrachi pisateli*, p. 112.
- 173 Among these were St. Petersburg's Second Military Hospital and the Tobol'sk Medical Board in Siberia, where he served as medical inspector. Tobol'sk, located on the upper Irtysh River, was the site of a garrison founded in 1587, during an early but sparse Muscovite settlement in Siberia.
  - 174 The role or understanding of "objectivity" in other contemporary schools of thought is beyond the scope of this study. However, the secondary literature suggests that the concept of "objectivity" did not have an organic home in the Russian intellectual tradition, in which philosophical thought—due to the political circumstances and state-directed elimination of philosophy departments—had a distinctly social cast. Within this social cast, the native emphasis was on "subjectivism," rather than objectivity. See Andrzej Walicki, *A History of Russian Thought from the Enlightenment to Marxism* (Stanford: Stanford University Press, 1979); and Alexander Vucinich, *Social Thought in Tsarist Russia: The Quest for a General Science of Society, 1861–1917* (Chicago: University of Chicago Press, 1976).
  - 175 R.W. Newell, *Objectivity, Empiricism and Truth* (London: Routledge & K. Paul, 1986), pp. 16–38.
  - 176 The best place to start is Lorraine Daston, "Objectivity and the Escape from Perspective," in special issue "The Social History of Objectivity," *Social Studies of Science* 22/4 (1992): 597–618. See also Solomon, *Objectivity in the Making*; and Lorraine Daston and Peter Gallison, *Objectivity* (Boston: MIT Press, 2007). Historians of science such as Daston and Steve Shapin have noted the rise of a new kind of "objective" knowledge-making at the end of the eighteenth century: see Shapin, *A Social History of Truth: Civility and Science in Seventeenth-Century England* (Chicago: University of Chicago Press, 1994); on the ways in which quantitative reasoning supported this development, see Theodore M. Porter, *Trust in Numbers: The Pursuit of Objectivity in Science and Public Life* (Princeton: Princeton University Press, 1995); and "Quantification and the Accounting Ideal in Science," *Social Studies of Science* 22 (1992): 633–52. Peter Dear has examined how seventeenth-century legal notions of impartiality and disinterestedness (not yet coupled with the term "objectivity"), along with legal procedures for the evaluation of testimony, were imported into early modern natural philosophy: Dear, "From Truth to Disinterestedness in the Seventeenth Century," *Social Studies of Science* 22 (1992): 619–31. The interest in the ideology of objectivity is not limited to the historical or scientific. For a recent take on the political undergirdings of normative methodologies in the sciences, see J.A. Schuster and Richard Yeo (eds.), *The Politics and Rhetoric of Scientific Method* (Dordrecht, Holland: Reidel, 1986). On the norm of objectivity with-

- in the profession of American history, see Peter Novick, *That Noble Dream: "The Objectivity Question" and the American Historical Profession* (Cambridge: Cambridge University Press, 1988).
- 177 Daston describes the various "subjectivities" that the different kinds of objectivity oppose. She isolates three different forms of "objectivity" that are conflated within our modern use of the word: ontological objectivity "pursues the ultimate structure of reality," mechanical objectivity "forbids judgment and interpretation in reporting and picturing scientific results," and a perspectival objectivity involves eliminating human, subjective idiosyncrasies. See Daston, "Objectivity," pp. 599–600.
- 178 Simonich, "Sudebno-meditsinskaia ob'ektivnost'," p. 160. Neither party (neither Sokolov nor Simonich) was against specialist knowledge *per se*, that is, "deep familiarity with science," as Simonich referred to it at one point. The issue was more a concern with how authority was distributed. Idem, p. 159.
- 179 Ibid., p. 160.
- 180 Ibid., p. 171. Emphasis my own.
- 181 Ibid., pp. 177–78.
- 182 It is worth noting that the Commission's examination of V. (February–March 1866) took place three months before V.'s health and physical condition deteriorated sharply, leading to his death while still in the hospital, on 25 June 1866. It thus would be reasonable to assume that V.'s health was already poor and on the decline when the Commission examined him, thereby offering more noteworthy physical changes to comment upon than under a normal condition of health (when Ergadt and his forensic-medical section examined V.). (Not to mention it being a one-time special assignment for the Commission.) However, though Simonich was meticulously aware of the timeline of the case—as evidenced by his analysis—he conspicuously omitted this chronological context, which would have undermined his argument and diluted his polemical point. Simonich, "Sudebno-meditsinskaia ob'ektivnost'," p. 169.
- 183 Ibid., p. 173.
- 184 Ibid. Emphasis as in original.
- 185 Daston, "Objectivity," pp. 611–12. Daston explains that the shift towards the aperspectival (i.e., the demise of the idiosyncratic) was due to the premium put on communicability of knowledge in response to the growth of an international scientific community, and the increasing division of labor within laboratories. In addition, it was related to the diminishing role of "skill"—a type of information too particular to person and place. In this way, according to Daston, mid-nineteenth century aperspectival objectivity was equated with "communicability." In short, in this period the tendency and direction of the sciences (and the function of "objectivity" in this context) was learning how to make scientific knowledge comprehensible to others—making it public

- knowledge. This thesis dovetails with that of Ted Porter in his study of objectivity in accounting. See Theodore M. Porter, “Quantification and the Accounting Ideal in Science,” in special issue “The Social History of Objectivity,” *Social Studies of Science* 22/4 (1992): 633–52.
- 186 See *Arkhiv sud. med.* (1866) kn. 4, 30–45; (1867) kn. 1, 40–5, 74–88; kn. 2, 71–148; kn. 4, 105–83; 1868, 295–327; (1869) kn. 2, 29–41, kn. 4, 89–97, 98–120; (1870) kn. 3, 36–56; kn. 4, 69–92. “Behind closed doors”: (1869) kn. 3, 73–86; (1870) kn. 4, 58–68; (1871) kn. 2, 19–34; kn. 4, 48–60.
- 187 In their articles, the physician-commentators reprinted trial transcripts, primarily taken from the Ministry of Justice newspaper, *Sudebnyi vestnik*, although general, local newspapers would also follow trials and publish court transcripts. Typically included were the indictment, as well as court speeches, testimony, and questions of all judicial actors (medical experts, defense lawyer, procurator, chairman of the court, and when relevant, witnesses) pertaining to the medical side of the case. At the end of the case transcripts, the author-physician would critique the physician-expert’s performance.
- 188 This “gearing up” took many forms, and entailed a veritable cottage industry of publications ranging from traditional forms (a plethora of handbooks and indexes) to translations of foreign legal monographs to the imported genre of published case studies. See “Kritika i bibliografiia” in *Zh. Min. Iust.* 30/10 (1866): 189.
- 189 The genre of the case study, in relation to Russian pedagogical and intellectual traditions, represented a departure from the “historical school” of law which had dominated Russian legal study up to the middle of the century. Even within the Ministry of Justice’s organ for discussing legal theory and legal questions—a source of the ideas and momentum behind the judicial reform—Russian judicial decisions and court process were open to learned discussion no earlier than 1859. Wortman, *Development of a Russian Legal Consciousness*, p. 252. *Zh. Min. Iust.* published roughly two hundred decisions of civil cases and fifty of criminal cases. The first examples of this new genre in Russia were the works of Aleksandr Liubavskii, *Sbornik zamechatel’nykh ugovnykh protsessov* (1865), followed by *Russkie ugovnye protsessy* (1867), in three volumes; vol. III was devoted to cases that included the insanity question (*Kazuistika dushevnykh boleznei*). For Koni’s review of the 1865 work, see “Kritika i bibliografiia,” *Zh. Min. Iust.* 28/4 (1866): 351–82.
- 190 Koni, “Kritika i bibliografiia,” *Zh. Min. Iust.* 28/4 (1866): 353.
- 191 *Ibid.*, p. 380.
- 192 While the post of *prokuror* had also been around *in name* since the eighteenth century, it wore many different administrative hats in the span of its existence. For more on the procuracy, see Chapter 4 of this book. While the term “prosecutor” is an accurate description of the post-reform role of the *prokuror*, the word “procurator” better reflects the institutional and judicial

- distinctiveness of this legal office in late imperial Russia. For this reason, I use the term “procurator” throughout this study.
- 193 Pelikan was vice chairman of the Medical Department at the time of his 1867 case study. From 1873 to 1884 he served as chairman of the Medical Council, the pinnacle of the medical-administrative hierarchy, where he served until his death.
- 194 E.V. Pelikan, “Delo o krest’ianke Mavre Egorovoi Volokhovoi, razsmatrivavsheesia v moskovskom okruzhnom sude, s uchastiem prisiazhnykh zasedatelei,” *Arkhir sud. med.* 2 (1867): 88–115. It was precisely the grisly circumstances of the case that generated tremendous public interest in it. The trial was well attended and covered by the large newspapers in Moscow and St. Petersburg, including *S-Peterburgskie vedomosti*, *Moskovskie vedomosti*, and *Sudebnyi vestnik*, nos. 37, 38, 39.
- 195 “Delo o krest’ianke Mavre Egorovoi Volokhovoi,” p. 88.
- 196 *Ibid.*, p. 93. The circumstances and testimony are culled from the bill of indictment, which was read at court by assistant procurator Gromnitskii, and reprinted in *ibid.*, pp. 88–94.
- 197 “Delo o krest’ianke Mavre Egorovoi Volokhovoi,” p. 97.
- 198 The term *corpora delicti* as used by Pelikan in original. Pelikan, “O znachenii estestvennykh nauk,” p. 42.
- 199 For Pelikan, this new technique was a source of national pride. He viewed the frequency of its use as a reflection of Russia’s stature relative to other countries. He proudly claimed that “[i]n no single state [*gosudarstvo*] are as many chemical-microscopic investigations of suspicious stains conducted as in Russia.” He did not back the claim with comparative figures, but for Russia, he cited the following: 1865—345 investigations were conducted (“nothing suspicious” was discovered in 103 cases); 1866—417 (in 145 nothing suspicious found); 1867—379 (out of these, blood was found 241 times, in the other 138 cases, the stains turned out to be not blood, but originating from greasy, resinous, tar, and “earthy” (*zemlistyi*) things, from sealing wax, rust, etc. *Ibid.*, p. 43.
- 200 Account from *Zh. Min. Iust.*, cited in *ibid.*, p. 42.
- 201 No weapon or clothing of the perpetrator was found. “Delo o krest’ianke Mavre Egorovoi Volokhovoi,” p. 108.
- 202 *Ibid.*, p. 93.
- 203 *Ibid.*, pp. 101–2. The protocol (and analysis) itself was an extensive and detailed list of every physical characteristic and measurement of every stain.
- 204 The “court” referred to a panel of three judges. Besides the chairman of the court, who served as presiding judge, the other two judges were referred to as “members” (*chleny*) of the court. Typically the physician who conducted the pre-trial examination attended the trial and read his own protocol; the exception was a chemical-microscopic analysis, due to its official origins as a

- practice conducted in (and limited to) provincial Medical Boards and the Medical Department in St. Petersburg.
- 205 “Delo o krest’ianke Mavre Egorovoi Volokhovoi, p. 106.
- 206 Ibid., p. 107.
- 207 Ibid.
- 208 Faced with this disagreement between the two experts over the question of difficulty, Pelikan, in his critique, took the professor’s side over the police physician, in keeping with his advocacy of introducing specialists into forensic-medical practice. As Pelikan put it, “[i]n this case, probability, without a doubt, is more on the side of Sokolov, as an experienced and artful anatomist.” Ibid., p. 114.
- 209 Ibid., p. 110.
- 210 Ibid.
- 211 Ibid., p. 111.
- 212 Ibid.
- 213 On the emergence of the inductive method in relation to the new experimental natural philosophy, see Shapiro, *Probability and Certainty*, pp. 168–69.
- 214 “Delo o krest’ianke Mavre Egorovoi Volokhovoi,” p. 112.
- 215 Ibid. Pelikan viewed Klein’s impressive performance as not only boding well for the “future of chemical and microscopic questions,” but also for the involvement of “specialists” in the new courts. In Pelikan’s words, Klein’s presentation “gives us hope that other courts, like Moscow’s, will be concerned with finding specialists for themselves, for the resolution of similar questions, which now all come tumbling down on either district or city physicians, or they are sent to the medical boards, and from there are forwarded still for checking in Petersburg, in the Medical Department.” Ibid., pp. 112–13.
- 216 “Delo Eleny Karvanen, razsmatrivavsheesia v zasedanii S.-Peterburgskii okruzhnago suda, s uchastiem prisiazhnykh zasedatelei, 5 Dekabria 1866 goda,” *Arkhiv sud. med.* 3/1 (1867): 74–88. The trial transcript for this case appeared in the legal newspapers, *Sudebnyi vestnik* 105 (1866), and *Glasnyi sud* 65, 66, 67 (1866).
- 217 A *meshchanin* was (officially, at least) a townsman or urban dweller, belonging to the *soslovie* (legal-ascriptive social category) of the *meshchanstvo*.
- 218 That the lungs floated in water was understood as proof that the child was born alive. (See below note 224 for a description of the test.) The presence of gases in the small intestines, however, was less well-established as an indicator within forensic medicine. In the view of the commentator, physician Potekhin, the significance of these gases did not yet carry the full weight of a fact, as it was still a “new fact” that was “not sufficiently worked out by science and has not received that value of certainty which the experts give it.” Reflecting, once again, the tremendous sway of foreign authorities, Potekhin

- deemed it a “new fact” of lesser value because European authorities in forensic medicine had not yet cited it. “At least,” as he explained, “neither Deverzhie, nor Casper, nor Shauenstein, nor Brian have mentioned it.” Potekhin, “Delo Eleny,” p. 82.
- 219 For a discussion of the penal sanctions for infanticide and how they reflected changing social attitudes towards women, and the state’s role as guardian over people’s biological welfare, see Engelstein, *Keys to Happiness*, pp. 106–14. Engelstein points out that in the last quarter of the nineteenth century, most Russian juries considered the penalties too harsh, and preferred to acquit or convict the least possible offense, the concealment of a dead infant’s body.
- 220 The institutional origins of the procuracy and its connection to autocratic interests are discussed at greater length in Chapter 4.
- 221 “Delo Eleny,” p. 78.
- 222 The commentator of this case, Potekhin, questioned the defense lawyer’s reference to opposing (and dubious) medical views of unnamed authorities. See note 226 below.
- 223 For another example of how these trends played out in practice, and physicians’ initial grappling with the new legal standard of “reliability,” see “Delo o Egor’evskom meshchanine Kirile Zheleznevskom, razsmatrivavsheesia v riazanskom okruzhnom sude, s uchastiem prisiazhnykh zasedatelei,” *Arkhir sud. med.* 2 (1867): 117–39. Speaking to the defendant’s mental condition in this arson trial, the physician self-consciously described his conclusions as “reliable,” and to demonstrate this, he delivered a prolix speech (not particularly related to medicine) “in order that [his] stated supposition become a reliable [*dostovernyi*] or, at least, probable [*veroiatnyi*] conclusion”—that is, until the chairman cut him off mid-sentence.
- 224 The lung flotation test was a classical test to determine whether a dead infant had ever breathed, and involved removing the infant’s lungs and placing them in water. Dense, uninflated fetal lung tissue was expected to sink, inflated lungs to float. The lung flotation test emerged during the seventeenth century, when it was first used in the forensic-medical investigation of infanticide. Forensic-medical texts maintained that if a birth was concealed, the lung test could clearly show that a child breathed. On the origins and gradual supplanting of the flotation test by careful examination of the lung itself, see Thomas Rogers Forbes, *Surgeons at the Bailey: English Forensic Medicine to 1878* (New Haven and London: Yale University Press, 1985), pp. 102–7. Forensic-medical texts also pointed out that one could not infer from this test (the fact that the child breathed) that the child was murdered, explaining that even after a normal delivery, the baby may not survive if the mother was alone, unconscious, and no one else was present to raise the infant and clear the air passages. Defense lawyer Arsenev, having clearly read up on infanticide from one such text, also cited this latter point as part of his defense.

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- 225 *USM*, art. 1836.
- 226 Defense Lawyer Arsenev elaborated on this, suggesting that during birth the infant could “be in a place where gases develop,” which can “end up” in the infant’s lungs and lower their specific weight, thereby allowing them to float in water. Potekhin (the commentator) dismissed this notion as “very strange,” since gases cannot get in the lungs without breathing. He added wryly that it was “unfortunate” the defense lawyer did not identify those “best representatives of forensic medicine” who allegedly proposed such an idea.
- 227 “Delo Eleny,” pp. 78–79.
- 228 The physician-experts dismissed the scenario that the liquid could have gotten into the nose and mouth if the child was thrown there already dead. While they acknowledged that this was possible, they doubted whether such a significant quantity of the liquid could have ended up there. *Ibid.*, pp. 79–80.
- 229 *Ibid.*, p. 77.
- 230 *Ibid.*, p. 76.
- 231 *Ibid.*, p. 80.
- 232 *Ibid.* Emphasis my own.
- 233 *Ibid.*
- 234 Guilty but “deserving clemency” was a verdict option under the reform, and, based on my examination of criminal cases with medical experts, juries employed it frequently.
- 235 In this regard, Potekhin was referring, disapprovingly, to how *akusher* Boreisho used negative evidence in his testimony cited above. Instead, Potekhin suggested that negative evidence could be employed effectively in a rhetorical, process-of-elimination manner, in which the expert would list all the possible causes of death and then “stop on the only probable or indubitable cause.” *Ibid.*, p. 86.
- 236 *Ibid.*, pp. 84–87.
- 237 *Ibid.*, p. 84.
- 238 *Ibid.*
- 239 *Ibid.* Emphasis my own.
- 240 *Ibid.*, p. 86.
- 241 The reform’s implementation and physicians’ response to it is the subject of Chapter 5.
- 242 On the shortage in the provinces, see *Russkaia Meditsina* (1885); on the preponderance of St. Petersburg publications, see *Russkaia Meditsina* 19 (1892): 303. On the general explosion of medical publishing from 1858–1864, see Frieden, *Russian Physicians*, pp. 109–10.
- 243 This timeframe is bracketed at one end (1855) by Russia’s defeat in the Crimean War and at the other, with Karakazov’s unsuccessful attempt on the life of Alexander II.

- 244 Vucinich, *Social Thought in Tsarist Russia*, p. 3.
- 245 The broader, practical developments which undergirded and helped to inaugurate the “age of science” have been well documented, and stemmed primarily from the reopening of Russia to Western influences of massive proportions, after the period of isolation that Nicholas I initiated following the 1848 revolutionary unrest in Western Europe. As I have elaborated above, this included increased study abroad, relaxed censorship, and translation activity to an unprecedented degree. From the standpoint of intellectual history, the centrality of materialism in Russian thought has been attributed to the fact that there were no professors of philosophy at Russian universities, another of Nicholas’ responses to 1848. See Walicki, *History of Russian Thought*, p. 215.
- 246 Earlier historical works have focused on how “scientism” and “positivism” figured within Russia’s radical movement and development of a critical *intelligentsia*, under the intellectual rubrics of nihilism (most vividly represented in the figure of D.I. Pisarev), materialism (typically embodied by N. Chernyshevskii), and more generally within the social grab-bag of *raznochintsy* (men of various ranks). Martin Malia, “What is the Intelligentsia?” in Richard Pipes (ed.), *The Russian Intelligentsia* (Cambridge: Cambridge University Press, 1961); Philip Pomper, *The Russian Revolutionary Intelligentsia* (New York: Crowell, 1970); and Daniel Brower, *Training the Nihilists: Education and Radicalism in Tsarist Russia* (Ithaca, NY: Cornell University Press, 1975). At the other end of the spectrum are those historians who look at science, defanged of its radical potential, as a component of a newly emerging civil society, outside of state-run institutions, and employed under the Russian *intelligentsia*’s traditional ethos of service to society. Hachten, “Science in the Service of Society”; and Engelstein, *Keys to Happiness*. Somewhere in the middle are studies that examine what James McClelland calls the “mystique of *nauka* (science).” A view particularly prevalent among Russian professors, this was the idea that knowledge and the sciences should be pursued for their own sakes with no utilitarian or practical goals, and that such an endeavor would itself eventually lead to social progress and reform. McClelland, *Autocrats and Academics*; on science in the universities see Alexander Vucinich, *Science in Russian Culture, 1861–1917* (Stanford: Stanford University Press, 1970).
- 247 This is not the place to give a full analysis of these intellectual orientations with their many nuances; suffice it to say, Chernyshevskii—a legatee of L. Feuerbach’s anthropological materialism, and aspects of Auguste Comte’s positivist philosophy—was the first consistent advocate in Russia of a scientific study of society, as ideological/philosophical justification for the intensifying demands for change in the structure of Russian society. Nihilism, which grew out of Chernyshevskii’s legacy, had a behavioral dimension as well as



intellectual, but in the general sense, nihilist philosophy was the philosophy of scientism: to nihilists, science was a panacea for all social ills and the only true path to a better society.

248 See Walicki, *History of Russian Thought*; and Vucinich, *Social Thought in Tsarist Russia*.

249 Pelikan, “Delo o krest’ianke Mavre Egorovoi Volokhovoi,” p. 112.

250 Legonin, “Sudebnaia Meditina,” p. 3.

## CHAPTER 3

### Legal Mechanics: Carving Out a New Identity

- 1 A word about words. First, in keeping with the usage of my actors, in this chapter I use the term “forensic physician” (*sudebnyi vrach*) to refer generally to any medical practitioner who performed forensic duties as an administrative function. In their commentary about the reform statutes, the Medical Council defined the “forensic physician” as “any physician invited in the capacity of a ‘knowledgeable person’ to the investigation.” RGIA, f. 1294, op. 6, 1864, d. 46, l. 8. As I argue in this book, the meaning of this term evolved in conjunction with developments born of the judicial reform, which I address in subsequent chapters, namely, the physician’s burgeoning significance in open judicial proceedings and the institutional-intellectual coalescence of forensic-medical activity into a specialized academic discipline. The fact that the Medical Council deemed it necessary to clarify their usage of the term “forensic physician” testifies to what I argue is the changing perception of this medical-administrative function in light of the judicial reform. Second, for the purposes of this chapter I use the term “forensic-medical procedure” to refer to the type of procedures covered in the reform statutes. The procedural rules in the judicial reform regulated the *physicians themselves* within the judicial context. Specifically, the new statutes encompassed matters of discipline, punishment, judicial relationships, and reimbursement, which pertained to physicians (in their forensic capacity). For convenience, I use the compressed phrase “forensic-medical procedure” as a substitute for the more literal but ponderous “procedures that pertained to forensic physicians.”
- 2 On the functions and structure of the Medical Council, the most comprehensive account remains the pre-Soviet monograph, Moiseev, *Meditinskii Sovet*.

- 3 RGIA, f. 1294, op. 10, 25 February 1864, d.113, no. 46. O peresmotre Ustavov o sudoproizvodstve i sudoustroistve, po predmetam kasaiushchiisia sudebno-meditsinskikh i prakticheskikh zaniatii vrachei i farmatsevtov.
- 4 RGIA, f. 1294, op. 6, 1864, d. 46. O peresmotre Ustavov o sudoproizvodstve i sudoustroistve.
- 5 *Materialy po sudebnoi reforme v Rossii 1864 goda. Tom 52. Ob'iasnitel'naia zapiska k Proekty Ustava ugolovnogo sudoproizvodstva (Knigi pervoi)* (St. Petersburg, 1863).
- 6 The general steps in the creation of the judicial reform have been well described by historians of Russian law. For a thorough account of the legislative process, as well as the players and ideology behind the reform, see Wortman, *Development of a Russian Legal Consciousness*. For a pared down chronology of the enactment of the reform, see Samuel Kucherov, *Courts, Lawyers and Trials Under the Last Three Tsars* (New York: F.A. Praeger, 1953), pp. 21–26. For a detailed picture and assessment of the process, see also I.V. Gessen, *Sudebnaia reforma* (St. Petersburg, 1905).
- 7 With regard to the medical branch: on the staffing of the Medical Council, and requirements for membership, see Moiseev, *Meditsinskii Sovet*, p. 32. With regard to the legal branch: on the backgrounds of upper-level legal officials, see Brian L. Levin-Stankevich, “The Transfer of Legal Technology and Culture: Law Professionals in Tsarist Russia,” in Harley D. Balzer (ed.), *Russia's Missing Middle Class*, pp. 223–50; and Richard Wortman, “Judicial Personnel and the Court Reform of 1864,” *Canadian Slavic Studies* 3/2 (1969): 224–34.
- 8 A.F. Koni, *Glavnye deiateli i predshestvenniki sudebnoi reformy* (St. Petersburg, 1904), p. 13.
- 9 The participants of the Criminal Section represented diverse posts within the legal arena. The variety of jurist-practitioners and high-ranking legal officials included: chief procurators (*ober-prokuror*) of the Senate (Butskovskii, Kovalevskii), judicial investigators (Aleksandrov, Makalinskii), provincial procurators (Popov, Prints), official in the chief procurator's office (Romanovskii), St. Petersburg investigative officers (*pristavy*) (Turchaninov, Kupriianov, Khristianovich), professor at the Imperial School of Jurisprudence (Utin); professor of criminal law (V.D. Spasovich); and trained legal expert and deputy secretary of the State Council (S.I. Zarudnyi). Other core members served in the State Council or the Second Section of His Imperial Majesty's Chancellery (Esipovich, Liubimov, Perets, Zubov). *Ob'iasnitel'naia zapiska*, pp. 1–2.
- 10 The exceptional nature of Rozov's participation did not go unnoticed; he received a handwritten note of praise for his work from Alexander II. *Arkhiv sud. med.* 1 (1865): 10–11.

- 11 For more on Rozov's career path and medical positions, see Zmeev, *Russkie Vrachy Pisateli*, p. 84; and *Russkii biograficheskii slovar'*, vol. 16 (St. Petersburg, 1913), pp. 423–24.
- 12 Butskovskii received training and originally worked in technical areas other than law. As a graduate of St. Petersburg's main engineering school (*glavnoe inzhenernoe uchilishche*), Butskovskii served as an officer in the Petersburg engineering command, and following that, worked as a teacher of mathematics and accounting. On Butskovskii's career, see Koni, "Nikolai Andreovich Butskovskii," in *Glavnye deiateli*, pp. 33–36.
- 13 N.A. Butskovskii, *O deiatel'nosti prokurorskago nadzora vsledstvie otdeleniia obvinitel'noi vlasti ot sudebnoi* (St. Petersburg, 1867); and idem, *O prigovorakh po ugovnym delam*.
- 14 *Ob'iasnitel'naia zapiska*, p. 2. This number of meetings was on par with the other sections. Under S.I. Zarudnyi's chairmanship, the Civil Section held ninety-one meetings. The three sections convened with greater frequency in their separate capacities than when joined for general meetings, which occurred only twenty-one times during the Commission's run. Koni, "Sergei Ivanovich Zarudnyi," p. 13.
- 15 *Ob'iasnitel'naia zapiska*.
- 16 Koni, "Nikolai Andreevich Butskovskii," p. 33.
- 17 In their enacted version, these draft articles were renumbered in the following manner: draft Article 298 became 336, 292 became 328, 435–37 became 489–90, 630 became 694, 929 became 978, and 920 became 970.
- 18 Conspicuously absent from the Medical Council's list of statutes were those regarding the examination of the accused's mental condition. Though the Criminal Section discussed the question of "whether to change the procedure for the attestation of the insanity of the accused," the resulting draft statutes (draft arts. 312–14, renumbered 353–55 in the enacted version) were not forwarded to the Medical Council with the other physician-related statutes. As its omission from the Medical Council's dispatch would suggest, the attestation of a defendant's mental state was viewed less as a medical issue than an administrative one. Only in the wake of the reform would legal procedures regarding the potentially insane offender be identified with and subsumed under the purview of the emerging discipline of forensic psychiatry. As an occupational field, forensic psychiatry developed—in the legislative if not intellectual sense—along a distinct track, before converging with forensic medicine under the judicial reform. For this reason, I discuss the reform statutes regarding the potentially insane offender separately, in Chapter 5. (Because they occurred at the investigative stage, the procedures for assessing mental state were placed under the same section of the reform code as the other investigation-related medical statutes. See Chapter 4,

- “About the investigation of the event of a crime,” section 1, “About the inspection [*osmotr*] and examination/attestation [*osvidetel'stvovanie*].”) 19 I refer to articles 435–37 as one provision because they constitute three components of the same procedural rule.
- 20 The implementation of the reform spawned a vast legal literature devoted to the deficiencies of the post-reform investigation. See, for example, A. Sokolov, “Nedostatki v proizvodstve predvaritel'nykh sledstviu,” *Iuridicheskii vestnik* 1–2 (1876): 22–66; K. Mal'chevskii, “O merakh k ustraneniuiu nedostatkov sledstvennoi chasti,” *Zh. grazh. i ugol. prava* 5 (1880); A. Bul'fert, *Reforma predvaritel'nogo sledstviia* (Moscow, 1881); N.T. “Sudebnyi sledovatel' po sudebnym ustavam i v deistvitel'nosti,” *Zh. grazh. i ugol. prava* 3 (1881); N. Kharizomenov, “O nedostatkakh sledstvennoi chasti po sudebnym ustavam,” *Zh. grazh. i ugol. prava* 2 (1881); I. Shcheglovitov, “Sledstvennaia chast' za dvadtsat' piat' let',” *Zh. grazh. i ugol. prava* 1 (1889): 1–36; and B.L. Brazol', *Ocherki po sledstvennoi chasti. Istoriia. Praktika* (Petrograd, 1916).
- 21 Of the thirty-four members who voted on the six procedural topics relating to forensic physicians, all except four voted consistently in the majority. Of those four exceptions, three (Buchkov [‘the Commission’s chairman’], Knirim, and Liubimov) voted in the minority in only one of their votes (B. and K. on art. 928 about reimbursement, and L. on art. 920 about punitive labor for pregnant or nursing convicts). The fourth member, Repinskii, took the minority position in two out of his five votes (arts. 928 and 920). Narrowing the sample to the twenty-eight members who participated in the three topics examined in depth in this chapter, all members who voted in the majority (twenty-six members) did so on each of the topics. The two remaining members, Rozov and S.I. Zarudnyi, consistently took the minority position and are discussed below (see note 23). *Ob'iasnitel'naia zapiska*, pp. 189–92, 222–27, 493–94, 340–44, 470–73.
- 22 For an illuminating analysis of official attitudes toward punishment and its social functions, see Abby M. Schrader, “Containing the Spectacle of Punishment: The Russian Autocracy and the Abolition of the Knout, 1817–1845,” *Slavic Review* 56/4 (1997): 613–44, esp. pp. 618–26; and idem, *Languages of the Lash*. As Schrader explains, “[a]lthough punishment in Imperial Russia certainly fulfilled a retributive function ... officials also used punishment to construct and maintain the social order in a wider sense.” “Containing the Spectacle of Punishment,” p. 618.
- 23 Rozov participated in the discussion of all six medical statutes, advocating the minority position in each of those cases. Besides Rozov, the only member of the jurist-laden Criminal Section to consistently take the minority position was prominent legal official S.I. Zarudnyi, who served as deputy chairman of the Drafting Commission. Zarudnyi participated in three of the total six forensic-medical questions under consideration (disciplinary procedures: arts. 435–37, oaths: art. 630, and punitive labor for nursing mothers: art. 920).

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- 24 For a run-down of the Medical Council's position on each article, see RGIA, f. 1294, op. 10, 25 February 1864, d.113, no. 46, ll. 368–69.
- 25 *Proekt Ustava ugodovnogo sudoproizvodstva*, art. 292. The procedure for fining official witnesses was stated in draft article 287.
- 26 *Ob'iasnitel'naia zapiska*, p. 182.
- 27 Ibid.
- 28 Ibid.
- 29 Specifically, they argued that authority should be transferred to the justices of the peace, explaining that this view was consonant with the *Fundamental Principles* (art. 19, point 1). Indeed, failure to appear at the investigation was considered a minor offense, and according to the fundamental principles, "cases about minor offenses [are] initiated by the justices of peace upon notification by the Investigator." By this tenet, justices of peace alone had the authority to assign penalties for minor offenses. The investigator was to act merely as an informant, without the authority to initiate a case, much less impose punishments.
- 30 *Ob'iasnitel'naia zapiska*, p. 183.
- 31 Ibid.
- 32 For a list of these members, see *ibid.*, pp. 181–82 and 186.
- 33 *Ibid.*, p. 184.
- 34 The state physician's myriad medical duties were outlined in *Svod zakonov*, vol. 13, *Ustavy blagochiniia* (1842), part 2, *Uchrezhdeniia i ustavy vrachebnye po grazhdanskoi chasti*, kn. 1, gl. 3, otd. 1.3, "O dolzhnosti Gorodovnykh i Uezdnykh Vrachei."
- 35 *Ob'iasnitel'naia zapiska*, pp. 184–85.
- 36 RGIA, f. 1294, op. 6, 1864, d. 46, l. 4.
- 37 *Ibid.* Emphasis as in original.
- 38 The monetary penalty was defined as "not higher than 25 rubles." *Ust. ugod. sudoproiz.*, art. 323. For more on physicians' annual salaries in the period that bridged the reform, see Frieden, *Russian Physicians*, pp. 47–48.
- 39 *Ob'iasnitel'naia zapiska*, p. 184.
- 40 *Ibid.*, p. 185.
- 41 *Ibid.*
- 42 *Ibid.*
- 43 *Ibid.*
- 44 *Ibid.*, p. 187.
- 45 *Ibid.*
- 46 *Ibid.*
- 47 On the debate over the introduction of the jury, see John Atwell, "The Jury System and its Role in Russia's Legal, Social, and Political Development from 1857–1914" (PhD thesis, Princeton University, 1970); and Girish N. Bhat, "Trial by Jury in the Reign of Alexander II: A Study in the Legal Culture of

Late Imperial Russia, 1864–1881” (PhD thesis, University of California at Berkeley, 1995).

48 Atwell, “The Jury System,” p. 19.

49 Excerpted from *ibid.*

50 In his opposition to the jury, Bludov was supported by Minister of Justice, Count V.N. Panin. *Ibid.*, p. 20.

51 This distinction was challenged after the reform’s implementation. One of the participants in these 1863 deliberations, investigator P.V. Makalinskii, was a central figure in the subsequent controversy. See P.V. Makalinskii, “K voprosu ob otvetstvennosti sudebnykh vrachei za neiauku k sledstviu,” *Sudebnyi vestnik* (1875).

52 The statutes were thus stated:

Article 435: “If the forensic physician, during the execution of his investigative duties, commits oversights or illegal activities, the judicial investigator informs the procurator about this.”

Article 436: “Upon the investigator’s announcement about, or actual attestation of the forensic physician’s oversight or illegal activity, the procurator can propose to the court the imposition of a disciplinary penalty. In the case of the necessity to prosecute, the procurator proposes this to the procurator of the judicial chambers [*palata*].”

Article 437: “The judicial institutions, upon the forensic physician’s oversights and other illegal activities ... request an explanation from the physician, and *with respect to special questions and conclusions*, from his authorities [*nachal'stvo*]. But then they can subject [the physician] to disciplinary penalty or prosecution without the consent of the medical authorities.” Emphasis my own.

53 For a list of these members, see *Ob'iasnitel'naia zapiska*, pp. 223 and 226.

54 RGIA, f. 1294, op. 10, 25 February 1864, d. 113, no. 46, l. 368ob.

55 *Ibid.*

56 *Ibid.*

57 *Svod zakonov*, vols. 15 and 13, respectively. The Medical Statutes (*Ustavy vrachebnye*) (1857) addressed the issue of disciplinary jurisdiction under vol. 1, “Medical Institutions,” section 1, “About the administration of medical ranks [*chiny*] in the provinces,” art. 27.

58 PSZ, 19 January 1797, no. 17743.

59 *Ustavy vracheb.*, art. 27, *primechanie* 2.

60 *Zakony sudoproizvodstva ugolovnogo*, vol. 15 (1857), art. 653.

61 *Ob'iasnitel'naia zapiska*, p. 227.

62 *Ibid.*, p. 224.

63 *Ibid.*

64 RGIA, f. 1294, op. 6, 1864, d. 46, l. 9ob.

65 The legislation to which the minority referred was *primechanie* 2 k art. 27. *Ust. vrach.* t. 13; and *Zak. sud. ugol.* t. 15, art. 653.

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- 66 *Ob'iasnitel'naia zapiska*, p. 225.
- 67 Ibid.
- 68 Ibid.
- 69 Ibid.
- 70 See Chapter 2 for discussion of factors surrounding the rise of specialism in Western countries.
- 71 *Ob'iasnitel'naia zapiska*, p. 225.
- 72 Ibid., p. 224.
- 73 *Proekt Ust. ugol. sudoproiz.*, art. 437.
- 74 The particular medical-administrative instance that was to participate would correspond to the type of charge (and severity of attendant punishment). In milder cases, in which the physician was subject to a monetary penalty by the circuit courts, the court would obtain the opinion of the provincial medical board. In cases with more severe consequences—removal from duty, or prosecution—the process was ratcheted up an administrative notch: the judicial *palata* would obtain the opinion of the Medical Council (the highest medical-administrative instance).
- 75 *Ob'iasnitel'naia zapiska*, pp. 225–26.
- 76 Ibid., p. 226. Emphasis my own.
- 77 RGIA, f. 1294, op. 6, 1864, d. 46, l. 8.
- 78 While Commission members did not question which specific medical activities were included under the statute, this issue arose upon implementation of the reform, and in conjunction with the growing presence of forensic-psychiatric testimony. As the number of jury trials increased, so too did confusion over whether the given statute (draft art. 298, renumbered 336) encompassed psychiatric examinations. Criminal Section participant P.V. Makalinskii, the country's most prolific and prominent judicial investigator, commented a few decades later about this confusion in his often cited manual for investigators. As he explained, this statute led to a practical question over the procedure for examining mental condition, and “the extent of the investigator's rights in this regard.” *Prakticheskoe Rukovodstvo dlia sudebnykh sledovatelei sostoiashchikh pri okruzhnykh sudakh* (St. Petersburg, 1894), p. 269.
- 79 This statute appeared under Chapter 4, “About the investigation of the event of a crime,” section 1, “About the inspection [*osmotr*] and examination/attestation [*osvidetel'stvovanie*].” This section outlined the rules governing the investigator's conduct of the investigation.
- 80 RGIA, f. 1294, op. 6, 1864, d. 46, l. 5.
- 81 Ibid. Emphasis my own.
- 82 *Ob'iasnitel'naia zapiska*, pp. 187–88.
- 83 Ibid., p. 188.
- 84 Rozov proposed that the law define certain circumstances as *prima facie* indications of “natural” death, and only in those exceptional, indicated cases could the investigator proceed *without* a physician's autopsy. He listed three

- sets of circumstances. One, for example, was “when a woman or her baby died in childbirth after a difficult and prolonged labor.” Further reflecting the medical/cultural norms of the day, Rozov qualified this last category: “But crude means, used by simple folk ... given their dangerous and fatal consequences for the mother or child, cannot be ruled out without legal investigation of improper treatment.” Rozov’s proposal was distinctive in that it reflected local medical experience, as opposed to deriving from administrative-legal precedent or imported legal codes. *Ibid.*, pp. 188–89.
- 85 For the names of those in the ten-member camp see *ibid.*, p. 189; for the thirteen-member camp, *ibid.*, p. 190.
- 86 The two investigators were P.V. Makalinskii and Aleksandrov.
- 87 *Ob’iasnitel’naia zapiska*, p. 189.
- 88 *Ibid.*, p. 189–90.
- 89 *Ibid.*, p. 190.
- 90 While true that police—not investigators—were the first ones on the scene of a crime, and responsible for differentiating criminal from non-criminal incidents, this did not preclude the investigator’s subsequent responsibility to identify all traces of violence for the purpose of the criminal investigation—and thus decide when a forensic physician was necessary. In their rebuttal, discussed below, the Medical Council addressed this red-herring aspect of the majority’s argument.
- 91 *Ob’iasnitel’naia zapiska*, pp. 190–91. The rule to which the majority referred was *Proekt Ust. ugol. sudoproiz.*, art. 211.
- 92 RGIA, f. 1294, op. 6, 1864, d. 46, ll. 5ob-6.
- 93 The Medical Council proposed a list that was more extensive than Rozov’s. *Ibid.*, ll. 7-7ob.
- 94 *Ibid.*, l. 6.
- 95 *Ibid.*
- 96 The State Council made this point as a response to draft article 290, which was *not* deliberated by the Criminal Section or Medical Council. Article 290 (renumbered 326) listed the different types of occupations that could be invited as experts: “[One] can invite in the capacity of knowledgeable people [*svedushchie liudi*]: physicians, pharmacists, professions, teachers, technicians, artists, craftsmen, treasurers, and individuals, who, by prolonged work in any kind of service or field, have acquired special experience.” It is significant that the State Council did not find it necessary to clarify this question of status with regard to any of the other occupational groups listed in the statute.
- 97 *Zhurnal soedin. depart. gosud. soveta* 47 (1864): 34.
- 98 *PSZ*, 19 December 1828, no. 2531. In the *USM* (1842) the rule appears as article 1305 (renumbered 1737 in the 1857 edition, and 1318 in the 1892 edition).
- 99 *Zhurnal soedin. depart. gosud. soveta*, p. 34.



- 100 In the enacted version of the code, the two articles appear as arts. 336 (draft art. 298) and 337 (the State Council's insert).
- 101 *Zhurnal soedin. depart. gosud. soveta*, p. 34.
- 102 On the medical bureaucracy and how it corresponded to the state's Table of Ranks, see Frieden, *Russian Physicians*, pp. 21–52. On the institution of the various service titles in the medical bureaucracy, see E.F. Brokgauz and I.A. Efron, *Entsiklopedicheskii slovar'*, "Meditsina v Rossii," vol. 18 (St. Petersburg, 1896), pp. 885–87. On the Table of Ranks more generally, see Helja A. Bennett, "Evolution of the Meanings of Chin: An Introduction to the Russian Institution of Rank, Ordering, and Niche Assignment from the Time of Peter the Great's Table of Ranks to the Bolshevik Revolution," *California Slavic Studies* 10 (1977): 1–43; and James Hassell, "Implementation of the Russian Table of Ranks During the Eighteenth Century," *Slavic Review* 29 (1970): 283–95.
- 103 Such accounts have privileged an understanding of professions based on Anglo-American experience. Historians of French and German professions have begun to move away from the prevailing sociological models of professions and professional development that were based upon Anglo-American particularities. See, for example, Cocks and Jarausch (eds.), *German Professions, 1800–1950* and Geison (ed.), *Professions and the French State*.
- 104 See, for example, Balzer (ed.), *Russia's Missing Middle Class*; Frieden, *Russian Physicians*; and Wirtschafter, *Social Identity in Imperial Russia*.

## CHAPTER 4

### Criminal Procedure in Social Context

- 1 Clark and Crawford (eds.), *Legal Medicine in History*. For a comparative perspective, see Crawford, "Legalizing Medicine," and "The Emergence of English Forensic Medicine." I would like to thank Professor Crawford for making her unpublished dissertation available to me. For earlier studies of the development of forensic medicine, see Forbes, *Surgeons at the Bailey*; E. Ackerknecht, "Early history of legal medicine," in Chester R. Burns (ed.), *Legacies in Law and Medicine* (New York: Science History Publications, 1977), pp. 249–71; Sydney Smith, "The History and Development of Forensic Medicine," *British Medical Journal* 1 (1951): 599–607; Roger Smith, "The Development of Forensic Medicine and Law-Science Relations," *Journal of Public Law* 3 (1954): 304–19; and Jaroslav Nemec, *International Bibliography of the History of Legal Medicine* (Bethesda, MD: US Department of Health, Education and Welfare, 1973).

- 2 Most of Crawford's discussion concerns France and Germany. As she explains, her comparative analysis can nevertheless be made with reference to a generalized "Continental legal system" because the differences among the civil-law countries with respect to the conduct of trials were insignificant relative to the fundamental contrast between England and the rest of Europe.
- 3 Crawford focuses on the German procedure of *Aktenversendung*, whereby the courts directly consulted university medical faculties. Crawford argues that this direct connection between courts and universities was a major factor which contributed to the development of a substantial medico-legal literature in Germany; conversely, she contends, the absence of such a system in England accounts in large part for its paucity of forensic-medical literature before 1800. According to Crawford, England's system of common-law trials, with their adversarial methods, limited scope for reviewing decisions, and use of juries to ascertain facts "exerted pressure in the opposite direction," that is, towards the oral presentation of evidence and a reluctance to give much authority to any sort of "expert."
- 4 Adversarial procedure is governed by the presumption of innocence, the overriding importance of orality in adjudication, and an official adherence to codified rules in the evaluation of testimony and material evidence. The jury trial, by virtue of its procedural format and legal-philosophical basis was both example and embodiment of adversarial justice.
- 5 Bhat, "Trial by Jury," pp. 42–47; and John P. LeDonne, "Criminal Investigations Before the Great Reforms," *Russian History* 1/2 (1974): 101–18.
- 6 See Balzer (ed.), *Russia's Missing Middle Class*.
- 7 This occupational group alone had the right to represent individuals in court, and served as the defense lawyers. The lawyer also was given the right to membership in a bar which controlled entry into the lawyers' guild, decided disciplinary matters involving lawyers, and autonomously performed a variety of administrative functions relating to attorneys. Levin-Stankevich, "Transfer of Legal Technology," p. 228. The State Council, responding to conservatives' fear of replicating the radical French *avocat*, decided to name the Russian lawyer the "sworn attorney" (*prisiazhnyi poverennyi*), which often went by the shortened term *prisiazhnyi*.
- 8 On the specific educational and experiential requirements for registration with the court as a lawyer and membership in the bar, see Levin-Stankevich, "Transfer of Legal Technology," pp. 231–34. In short, only those holding degrees from a university law faculty or a law school were eligible to become lawyers.
- 9 In addition, as a consequence of the reforms, procurators and judges were to hold law degrees and required to have served specified periods in the courts.
- 10 LeDonne, "Criminal Investigations," and Levin-Stankevich, "Transfer of Legal Technology," p. 224.

- 11 For a close analysis of this trend, and the changing composition of the pre-reform courts, see Wortman, *Development of a Russian Legal Consciousness*.
- 12 The positions of *guberniia* and district *striapchie* were established under the *guberniia* reform of 1775, to assist the also new post of *guberniia* (provincial) procurator in his relations with the courts. This reform also altered the structure and functions of the procuracy, entrusting the procurator's office for the first time with managing prosecution on behalf of the state. But this function was insignificant, due to the inquisitorial system of investigation (procurators and *striapchie* could not appear in court) and theory of formal proofs. Sergei M. Kazantsev, "Judicial Reform of 1864 and the Procuracy," in Peter H. Solomon, Jr. (ed.), *Reforming Justice in Russia*, p. 50. The only exceptions who could not serve as *striapchie* were peasants of crown lands, minors, clergymen, and ex-convicts.
- 13 Levin-Stankevich, "Transfer of Legal Technology," p. 226. On the pre-1864 development of court structure and personnel, see also Peter H. Solomon Jr., "Courts and their Reform in Russian History," in Peter H. Solomon, Jr. (ed.), *Reforming Justice in Russia*, p. 6.
- 14 On the changes in legal education, see Wortman, *Development of a Russian Legal Consciousness*; and Levin-Stankevich, "Transfer of Legal Technology."
- 15 Wortman, *Development of a Russian Legal Consciousness*.
- 16 Wortman, "Judicial Personnel."
- 17 Ibid.
- 18 *Svod zakonov*, vol. 16, pt. 1, *Uchrezhdenie sudebnykh ustanovlenii*, arts. 263–67.
- 19 See Wortman, *Development of a Russian Legal Consciousness*, chapters 3 and 4.
- 20 This contrasted with countries such as France where entry into judicial or prosecutorial office was usually predetermined by the kind of training chosen by a law student, and where the two career paths followed divergent routes. Brian L. Levin-Stankevich, "Cassation, Judicial Interpretation and the Development of Civil and Criminal Law in Russia, 1864–1917: The Institutional Consequences of the 1864 Court Reform" (PhD thesis, State University of New York at Buffalo, 1984), p. 171.
- 21 Less frequently encountered terms: the term *pravoved*, used by pre-reform legal experts, was apparently relegated to academicians who themselves seemed to prefer the term *iurisprudent* (jurisprudent). The term *advokat* (derivative of the French term *avocat*) connoted political independence and social service, and officially designated the defense lawyer.
- 22 Levin-Stankevich, "Cassation," p. 171.
- 23 The "court" itself consisted of a minimum of three "members" (*chleny*), while the court was in session, including the main presiding judge, who was

- designated as the chairman of the court (*predsedatel' suda*). This panel of judges, "the court," is discussed later in this chapter.
- 24 Daniel T. Orlovsky, "Professionalism in the Ministerial Bureaucracy on the Eve of the February Revolution of 1917," in Balzer (ed.), *Russia's Missing Middle Class*, p. 279. According to Orlovsky, the apex of the judicial hierarchy, however, was divided along class lines. The Ministry of Justice had an aristocratic element, most often comprised of graduates of the Imperial School of Jurisprudence or the Law Faculty of St. Petersburg University, while members of the lower gentry service class and *raznochintsy* formed the backbone of the judicial cadres of the ministry.
  - 25 Levin-Stankevich, "Cassation," pp. 256–57.
  - 26 The Senate's Cassation Departments were the highest court of appeal under the reformed judicial system and the major post-reform source of legal revision in the form of decisions that tinkered with judicial procedure. Cassation decisions, officially non-binding, acquired the significance of law and to an extent operated as a *de facto* system of precedent. These departments are discussed to a greater extent below.
  - 27 Basically, the embryonic legal world of late imperial Russia consisted of the legal societies attached to universities, and those who read the societies' journals.
  - 28 See, for example, Levin-Stankevich, "Transfer of Legal Technology," esp. pp. 231–44.
  - 29 Orlovsky, "Professionalism in the Ministerial Bureaucracy," pp. 268–69.
  - 30 The exception was the Second Section of the Ministry of Justice, the locus of direct ministerial relations with the courts. The Ministry rarely corresponded directly with judges; direct correspondence occurred only between the Ministry and the highest court, the Cassation Departments. Levin-Stankevich, "Cassation," p. 167.
  - 31 William Wagner, "Tsarist Legal Policies at the End of the Nineteenth Century: A Study in Inconsistencies," *Russian Review* 54/3 (1976): 376–77.
  - 32 Kazantsev, "Judicial Reform of 1864 and the Procuracy," p. 59.
  - 33 According to Kazantsev, the need to reform the Senate precipitated the final decision on the establishment of the procurator's office. On 18 January 1722, Peter issued his edict on the reform of the Senate, and therein was the first mention of the Procurator General and the *Ober-Procurator*. Soon after, a special edict was issued on the "Duties of the Procurator General." Kazantsev, "Judicial Reform of 1864 and the Procuracy," p. 47.
  - 34 On the various changes the procuracy underwent under different reigns, see *ibid.*, pp. 46–52. One of the more fundamental changes, and one that is relevant to our present discussion, accompanied the 1802 establishment of the ministerial system of government. With the introduction of this system, the post of the Procurator General was united with that of the minister of justice.
  - 35 Kazantsev, "Judicial Reform of 1864 and the Procuracy," pp. 43–59.

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- 36 Ibid., p. 49.
- 37 In place of the *guberniia* and district *striapchie*, the new post of assistant procurator was established. All procurators and their assistants were appointed by the tsar on the recommendation of the minister of justice. On the organizational changes, see *ibid.*, p. 54.
- 38 The judicial rules of 1864 greatly restricted the sphere of the procurator's involvement in civil cases in comparison with the earlier laws. What remained for the procuracy was the task of "advising" courts, thereby ensuring that settlements were consistent with the laws. Specializing in criminal prosecution, they had less knowledge of civil law than the judges of the civil court. According to Kazantsev, both judges and other participants in the proceedings regarded the procurator's involvement as superfluous. *Ibid.*, p. 58.
- 39 In practice, almost as a rule, it was the assistant procurators who appeared in court.
- 40 Also at his discretion, in this relation, was the option of prosecuting the defendant on lesser charges in order to obtain a guilty verdict more easily (plea bargaining), and the option to request leniency for the accused. Levin-Stankevich, "Cassation," p. 188.
- 41 One of the Ministry of Justice's measures which reflected this interest was Pahlen's institution of the requirement for procurators to keep statistical records of the percentage of their cases which resulted in convictions and to report these figures annually. Gessen, *Sudebnaia reforma*, p. 146. The Statistical Section of the Ministry of Justice collected statistics from the prosecutors at each level of the court hierarchy, most pertaining to financial matters but also records of judicial activities such as jury performance.
- 42 See Levin-Stankevich, "Cassation," chapter 6. These ministers of justice include Count Pahlen (1867–1878), D.N. Nabokov (1878–1885), N.A. Manasein (1885–1894), N.V. Murav'ev (1896–1904), and I.G. Shcheglovitov (1906–1915). Succeeding Pahlen, Nabokov failed to carry out the tsar's orders to limit the courts and to make them more amenable to the interests of the state in private and criminal law proceedings; he was ousted by conservatives in 1885. Levin-Stankevich, "Cassation," p. 197. Orlovsky cites A. Dem'ianov, assistant minister of justice in 1917, who contended that the ministry of Shcheglovitov brought to the fore large numbers of pure careerists who expressed a particularly reactionary spirit in their judicial work, a spirit that included enormous hostility to independent attorneys such as Dem'ianov (who along with many such attorneys, happened to be a popular socialist). Orlovsky, "Professionalism in the Ministerial Bureaucracy," p. 279. On this period (1870s and 1880s), known as the period of "judicial counter-reforms," see Wagner, "Tsarist Legal Policies," pp. 376–77; Zaionchkovskii, *Rossiiskoe samoderzhavie v kontse XIX stoletii* (Moscow, 1970), pp. 234–61; and B.V. Vilenskii, *Sudebnaia reforma i kontr-reforma v Rossii* (Saratov, 1969), pp. 220–65.

- 43 The Ministry of Justice utilized various extra-administrative means, such as use of temporary appointments to sidestep the appointment of qualified but undesirable candidates for a particular position, and granting civil service rewards (pensions and “orders”) to trustworthy officials in the courts. For other methods, see Gessen, *Sudebnaia reforma*, p. 185.
- 44 Levin-Stankevich, “Transfer of Legal Technology,” p. 237.
- 45 Levin-Stankevich, “Cassation,” p. 182.
- 46 This designation is quoted in Kazantsev, “Judicial Reform of 1864 and the Procuracy,” p. 55.
- 47 *Ust. ugol. sudoproiz.*, art. 281. The 1864 reform statutes in their entirety are known as *Sudebnye ustavy 20 noiabria 1864 goda* and are contained in *Polnoe sobranie zakonov Rossiskoi Imperii*, vol. 39, 2nd ed. (St. Petersburg, 1867).
- 48 PSZ, nos. 35890–2. See A. Kvachevskii, *Ob ugovnom presledovanii, doznani i predvaritel'nom izsledovanii prestuplenii po Sudebnym Ustavam 1864 goda. Teoreticheskoe i prakticheskoi rukovodstvo* (St. Petersburg, 1866).
- 49 Kazantsev, “Judicial Reform of 1864 and the Procuracy,” p. 56.
- 50 On the French system, see Harris, *Murders and Madness*, esp. pp. 125–54; Esmein, *History of Continental Criminal Procedure*, pp. 528–69; Benjamin F. Martin, “The Courts, the Magistrature, and Promotions in Third Republic France, 1871–1914,” *American Historical Review* 87 (1982): 977–1009; and James W. Garner, “Criminal Procedure in France,” *Yale Law Journal* 25 (1916): 255–84. On Russian restrictions on defense lawyers, see Bhat, “Trial by Jury,” p. 64. On Russian defense lawyers, see Levin-Stankevich, “Transfer of Legal Technology,” pp. 228–34; and Wortman, *Development of a Russian Legal Consciousness*.
- 51 While granted official “member” status, no judicial investigator appears to have actually sat in as a member of the court *during* a trial, according to Bhat, “Trial by Jury.” The investigator was invested with this authority according to *Ustavy, Uchrezhdenie sudebnykh ustanovlenii* (Statutes on Judicial Institutions), arts. 77–79 and 140.
- 52 See Esmein, *History of Continental Criminal Procedure*.
- 53 Harris, *Murders and Madness*, p. 25.
- 54 See *ibid.*; Crawford, “Emergence of English Forensic Medicine”; Liman, *O neobkhodimosti dlia iuristov izucheniia sudebnoi meditsiny*, trans. from German by N. Lamanskii (St. Petersburg, 1866); and Casper, *Handbook of the Practice of Forensic Medicine*. For more on the tension between physicians and investigators, see Becker, “Judicial Reform.”
- 55 On the inclusion and meaning of the expression *corpus delicti* in Russian criminal law, see N.S. Tagantsev, *Russkoe ugovnoe pravo: Lektsii*, 2nd ed. (St. Petersburg, 1902). On the relation between this principle and Continental and English systems of medical expertise, see Crawford, “Emergence of English Forensic Medicine,” pp. 163–68 and 145–202; and *idem*, “Legalizing Medicine,” pp. 89–116.

- 56 For a comparison of English and Continental systems, see Crawford, “Emergence of English Forensic Medicine,” pp. 165–70. On French criminal procedure, see Harris, *Murders and Madness*, pp. 125–31.
- 57 As mentioned in the preceding chapter, the judicial reform statutes defined which types of physicians the investigator was to summon for forensic duties according to the physician’s state-defined service title (city, district, or police physician), based on a 1797 law.
- 58 The question of guilt in late imperial Russia was comprised of the following three questions: 1) whether the event of a crime was committed (*sostav prestupleniia*); 2) whether or not this crime was the act of the defendant; and 3) whether or not the defendant can/should be found responsible for his actions. While all of these questions were decided conclusively in the court session, they were also the subject of preliminary investigation. The forensic physician participated in the investigation of the first and third questions in particular (with the latter being the specific terrain of forensic psychiatry). See L.E. Vladimirov, *Uchenie ob ugovnykh dokazatel’stvakh. Osobennaia chast’*. Kniga pervaiia. *Lichnyi sudeiskii osmotr i zakliuchenie ekspertov* (Kharkov, 1886), p. 62.
- 59 *Ust. ugol. sudoproiz.*, arts. 315–22.
- 60 *Ibid.*, arts. 325–34. By the 1880s, the Cassation Department of the Senate substituted the term “expert” (*ekspert*) for “knowledgeable people” (*svedushchie liudi*) in its rulings about forensic medicine. See *Uk. O. C. First and Cassation Departments of the Senate*, November 1883.
- 61 *Ust. ugol. sudoproiz.*, arts. 336–52.
- 62 *Ibid.*, arts. 350–52 and 353–55 respectively. As we shall examine in the following chapter, late nineteenth-century handbooks of forensic-medical legislation—written to aid forensic physicians through the ever changing thicket of legislation and directives—separated out these latter three psychiatric statutes and discussed them as a distinct topic under its own rubric, which often included different types of sexual crimes. Nevertheless, statutorily and procedurally psychiatric expertise remained a subgroup of forensic medicine more generally. See, for example, S.N. Ippolitov, *Sbornik zakonopolozhenii o sudebno-meditsinskikh issledovaniiaakh. Spravochnaia kniga dlia sudebnykh vrachei* (St. Petersburg, 1910).
- 63 *Ust. ugol. sudoproiz.*, art. 330. This activity fell under the investigator’s more general responsibility to document external signs of criminal activity as well as any changes made at the crime scene. For a description of the initial police and investigatory activity at a crime scene, see D-ra med. V. Snigirev, “Ustav sudebnoi meditsiny 1857 goda i sudebnye ustavy 1864 goda,” *Arkhiv sud. med.* 2 (1867): 5.
- 64 Vladimirov, *Uchenie ob ugovnykh dokazatel’stvakh*, p. 29.
- 65 *Ust. ugol. sudoproiz.*, art. 338.
- 66 *Ibid.*, art. 336.

- 67 Ibid., art. 258.
- 68 S. Godlevskii, "O sudebnoi ekspertize: K voprosu o znachenii 'svedushchikh liudei' v ugovnom sudoproizvodstve," *Zhurnal iuridicheskogo obshchestva* 13 (1894): 77.
- 69 *Ust. ugol. sudoproiz.*, art. 254.
- 70 Snigirev, "Ustav sudebnoi meditsiny," p. 6.
- 71 On the common source of forensic medicine and medical police duties, see Chapter 1. On the preference of Nicholas I (1825–1855) for police law (police over judicial authority), and administrative measures rather than legal procedures as instruments of domestic police, see Andrzej Walicki, *Legal Philosophies of Russian Liberalism* (Oxford: Clarendon Press, 1967), p. 28. For more on the administrative measures of Nicholas I, see Engelstein, *Keys to Happiness*.
- 72 On the frequency of autopsies in relation to other forensic-medical tasks at mid-century, see Pelikan, "O znachenii estestvennykh nauk," p. 45.
- 73 See V. Snigirev, "O povodakh sudebnykh-meditsinskikh vskrytiakh," *Arkhiv sud. med.* (1866).
- 74 The 1842 Statute of Forensic Medicine (based on the 1828 Rules of Forensic Medicine) remained active until 1917. The judicial reform of 1864 further elaborated and defined forensic-medical procedure. *Sudebnye ustavy 20 noiabria 1864 goda*, vol. I, *Ustav grazhdanskogo sudoproizvodstva*, and vol. II, *Ustav ugovnogo sudoproizvodstva* (St. Petersburg, 1867). The conflict generated by the dual bodies of regulation is the subject of the next chapter.
- 75 For example, before a burial could take place the police had to confirm—via inquest—that the death was not the result of violence. The physician participated in such matters in cases of sudden death. Snigirev, "Ustav sudebnoi meditsiny," p. 7.
- 76 P.R., "Glasnyi sud," p. 14.
- 77 *Ust. ugol. sudoproiz.*, art. 338.
- 78 Ibid., arts. 315 and 336.
- 79 Vladimirov, *Uchenie ob ugovnykh dokazatel'stvakh*, p. 31.
- 80 *Ust. ugol. sudoproiz.*, art. 315. According to jurist Vladimirov, "witnesses of the examination are necessary since they can serve as evidence that all that was written by the individual who conducted the inspection was actually found, that the examination actually was conducted, and that nothing found during the exam was left out of the protocol." Vladimirov, *Uchenie ob ugovnykh dokazatel'stvakh*, p. 5. According to article 320, *poniatye* (official witnesses) were invited from among the local inhabitants: in cities—the master/owners of houses, shops, industry and trade establishments, and also from their managers and chief of affairs/attorneys; in localities and villages—besides the aforementioned individuals, landowners, *volost'* (small administrative district), and village officials and church elders. In cases "which could



brook no delay,” the court investigator could invite other individuals who were highly regarded and held their community’s trust. The number of *poni-ati* could not be less than two (art. 321).

81 Ibid., art. 316.

82 Ibid., art. 331.

83 Ibid., arts. 351 and 322, respectively.

84 Ibid., art. 342.

85 P.R., “Glasnyi sud,” p. 14. A *fel’dsher* was a medical assistant, the rough equivalent of paramedical personnel.

86 Shershavkin, *Istoriia otechestvennoi sudebnomeditsinskoi sluzhby*.

87 *Ust. ugol. sudoproiz.*, arts. 467 and 319.

88 The physician alone signed the section of the protocol which was his official conclusion (*zakliuchenie*), that is, the conclusion he drew from his examination. Ippolitov, *Sbornik zakonopolozhenii*, pp. 19–22.

89 *Ust. ugol. sudoproiz.*, arts. 468 and 319. See also *Sbornik zakonopolozhenii*, p. 19.

90 *USM* (1857), art. 1747.

91 *Ust. ugol. sudoproiz.*, art. 332.

92 Vladimirov, *Uchenie ob ugovolnykh dokazatel’stvakh*, p. 120.

93 Ibid., pp. 16–18.

94 *Ust. ugol. sudoproiz.*, art. 333. The article states: “Knowledgeable people [experts] in the conduct of their investigation should not leave from view those indications [*priznaki*] which the investigator ignored, but the investigation of which could lead to the discovery of truth.”

95 Crawford, “Emergence of English Forensic Medicine”; and Bhat, “Trial by Jury,” pp. 64–74.

96 Psychiatric expertise was the most frequently cited example in such arguments. According to these arguments, physician-specialists could only evaluate an offender’s mental condition properly with information about the offender’s daily life, habits, and history. Concretely, this meant gaining procedural rights to see all case documents and question witnesses and relatives free from the potentially harmful interference of someone untrained in medicine, such as the investigator. Based on the example of psychiatric expertise, commentators extended their call for greater rights to all types of medical expertise, and all physician-experts.

97 Vladimirov, *Uchenie ob ugovolnykh dokazatel’stvakh*, pp. 16–18.

98 Ibid., p. 77.

99 For example, see “Perechen’ voprosov, raz’iasnenie kotorykh trebuetsia pri napravlenii del po 353 art. Ust. ugol. sudoproiz.,” *Tsirk. M-ra Iust.* no. 26199, 1888.

100 Shtol’ts, *Rukovodstvo k izucheniiu sudebnoi meditsiny*.

101 On the German system of forensic-medical review, see note 3 above.

- 102 *Ust. ugol. sudoproiz.*, art. 343.
- 103 *Ibid.*, arts. 334–35. Prominent Petersburg physicians, including psychiatrists, were chosen to act as advisory members of the Medical Council under the Ministry of Internal Affairs. The Medical Council was founded in 1803, began work in 1804, and functioned over a century until the fall of the tsarist regime. Members were responsible for decisions and questions about the organization of medical (including psychiatric) practice, reviews and notifications of medical publications, and the rendering of expertise in contested and controversial criminal cases. Leading psychiatrists who frequently testified before the Petersburg circuit court and served as Council members include I.M. Balinskii (Council tenure, 1861–1895)—professor and first head of the psychiatry department at the Medical-Surgical / (renamed) Military-Medical Academy, St. Petersburg; I.P. Merzheevskii (1876–1908)—successor of Balinskii as head of the Academy’s psychiatry department, director of the psychiatric clinic of the Military-Medical Academy, and founder of *Vestnik klinicheskoi i sudebnoi psikhiatrii i nevropatologii* (1883–1899); V.M. Bekhterev (1894–1916)—successor of Merzheevskii as head of the Academy’s psychiatry department, founder of the Psychoneurological Institute in St. Petersburg, and of the journals *Obozrenie psikhiatrii, nevrologii i eksperimental’noi psikhologii* (1896–1911) and *Vestnik psikhologii, kriminal’noi antropologii i gipnotizma* (1904–1919). Between 1822 and 1912, the Medical Council oversaw 5,956 cases which demanded forensic-medical analysis and decisions.
- 104 In its decision, the Senate stated that when the investigator doubted the correctness of the *ekspertiza*, “the investigator does not have the right to call another physician and is required to present a copy of the physician’s protocol along with a copy of the physician’s conclusions [*zakliuchenie*] to the Medical Section of the Provincial Board for the resolution of the doubt.” P.O.C. First and Cassation Department of the Senate 1886, no. 17, 1886.
- 105 *Ust. ugol. sudoproiz.*, art. 342.
- 106 *USM*, article 1747, which corresponds with article 1329 of the 1892 edition. This article was not included in the 1905 edition.
- 107 *Ibid.*, article 1748, which corresponds with article 1199 of the 1905 edition; *Ust. ugol. sudoproiz.*, art. 344. The terminology for forensic-medical court documents and their changing significance under the new judicial statutes was a source of confusion even for legislators in the Senate. On this Senate’s confusion, see A. Sokolov, “Sudebno-meditsinskaia ekspertiza: po tsirkuliarnym ukazam pravitel’stvuiushchego senata,” *Zh. grazh. i ugol. prava* 20/4 (1890): 132–33.
- 108 *Ust. ugol. sudoproiz.*, art. 344.
- 109 *USM*, arts. 1750–54.
- 110 Rozhanovskii, *Sudebno-meditsinskaiia ekspertiza*, p. 24.

- 111 For example (as discussed in Chapter 2), in nineteenth-century Austrian law, the results of the expert's activity, whether oral or written, were composed of two parts: 1) the simple descriptive report about the facts collected by the expert and; 2) the explanation of these facts or "opinions."
- 112 Ibid., art. 1750.
- 113 Ibid., articles 1747, 1748, 1749 describe the compilation. Articles 1750–56 describe the content.
- 114 Ibid., art. 1751. This article specified that in the "introduction" the physician was to state why the request for the examination of the body was made, when the request was made, and when the physician received the request. In addition, he was to include the subject's name (if known), occupation (*remeslo*), official title (*zvanie*), age, and sex. After the official bureaucratic and administrative information was completed, the physician could move on to the medical information about the position in which the body was found; his explanation for why a given type of dissection was undertaken; which members of the police were assigned to the given *akt* (something intimately connected to the medical content, as discussed above); and finally, where and when the examination took place.
- 115 According to the statute, the "historical part" should include a "description of the entire course of the investigation, with all the appearances [*iavleniia*] and signs [*priznaki*] that were manifest in it. The forensic physician should describe them in the exact order in which they are found, differentiating thoroughly that which was discovered during the actual investigation, from that which was known by accounts of 'extraneous' individuals, who should be named here, or that which was discovered from formal documents about the case (which were sent for the purposes of the case), with indication of the number and pages, where and what it stated."
- 116 As stated in *USM*, art. 1753: "The opinion should be based on that which was actually discovered during the dissection [*vs krytii*]. This opinion should be justified and confirmed by clear and sufficient evidence, in accordance with the rules of anatomy, physiology, pathology, and chemistry ... and based, if possible, on the unquestioned experience and observations of classical authors on this subject."
- 117 In Austrian law, the equivalent "conclusive opinions" were likewise regarded as the most important part of the *ekspertiza*. For a comparison of Russian forensic-medical legislation with that of Western countries, see Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*.
- 118 *USM*, art. 1756.
- 119 Ibid., article 1750; corresponds with article 1200 (1905).
- 120 Atwell, "The Jury System," p. 51. This public interest was not limited to the capital cities, but displayed in provincial cities as well. The first trial by jury to take place in Kharkov, in February 1868, was a major social occasion, with

- the city's prominent authorities and notables admitted by ticket only. Besides being a novelty for spectators, the jury's function was new for its members as well: after their deliberations in this inaugural case, the jury re-entered the courtroom and on the defendant's charge of burglary, responded "God only knows—we do not." This account is cited in Richard C. Sutton, "Crime and Social Change in Russia after the Great Reforms: Laws, Courts, and Criminals, 1874–1894" (PhD thesis, Indiana University, 1984), p. 34.
- 121 Because of the limited population and language barriers, the distant northern regions, Siberia, and Central Asia were not given jury trials and their judicial apparatus remained unchanged until the end of the nineteenth and early twentieth century. Bhat, "Trial by Jury," p. 35.
- 122 See Baberowski, *Autokratie und Justiz*.
- 123 Eugene Huskey, *Russian Lawyers and the Soviet State* (Princeton: Princeton University Press, 1986), pp. 17–18.
- 124 Bhat, "Trial by Jury," p. 35.
- 125 On the official and public debates over the introduction of the jury system, see Atwell, "The Jury System"; on the question of the relationship between the Russian jury and foreign models, see *idem*, pp. 36–39.
- 126 Qualification criteria for jury candidates were exacting in many respects and often drew fire from concerned jurists and legal reformers. For more on jury selection, see Kucherov, *Courts, Lawyers and Trials*, pp. 59–61; and Bhat, "Trial by Jury," p. 34.
- 127 On juries' social composition and its *repressivnost'* (willingness to convict), see Aleksander K. Afanas'ev, "Jurors and Jury Trials in Imperial Russia, 1866–1885," in Eklof, et al. (eds.), *Russia's Great Reforms*, pp. 214–30.
- 128 Atwell, "The Jury System," pp. 75–76.
- 129 Solomon, "Courts and their Reform," p. 6.
- 130 Bhat, "Trial by Jury," p. 33; Kucherov, *Courts, Lawyers and Trials*, p. 88; N.N. Efremova, *Ministerstvo Iustitsii Rossiiskoi Imperii, 1802–1917* (Moscow, 1983), p. 69. Below the circuit court level, without a formal jury, the vast majority of civil and criminal cases were handled by justices of the peace, *volost'* courts, and "minority courts." On these various jurisdictions, or what Neuberger calls "legal cultures," see Solomon (ed.), *Reforming Justice in Russia*, esp. pp. 21–130; Czap, "Peasant Class Courts"; Stephen Frank, "Popular Justice, Community and Culture among the Russian Peasantry, 1870–1900," *Russian Review* 46 (1987): 239–65; Cathy A. Frierson, "Rural Justice in Public Opinion: The Volost' Court Debate, 1861–1912," *Slavonic and East European Review* 64/4 (1986): 539; Joan Neuberger, "Popular Legal Cultures: The St. Petersburg Mirovoi Sud," in Eklof et al. (ed.), *Russia's Great Reforms, 1855–1881*, pp. 231–47.
- 131 The most notable divergence from this otherwise rigid norm was the sensational political trial of Vera Zasulich in 1878. On this trial, which was per-

- haps the best known legal episode in the late imperial era among Western historians, see Kucherov, “The Case of Vera Zasulich,” *Russian Review* 11/2 (1952): 86–96; and Bhat, “Moralization of Guilt,” pp. 110–13.
- 132 Efremova, *Ministerstvo Iustitsii Rossiiskoi Imperii*, pp. 69–71; Afanas’ev, “Jurors and Jury Trials,” pp. 60, 122–23; and Bhat, “Trial by Jury,” p. 34.
- 133 Afanas’ev, “Jurors and Jury Trials,” p. 123.
- 134 Bhat makes the important observation that adversarialism in law and judicial practice was not wholly unprecedented in Russia at the outset of the 1864 reform. Bhat notes that although the familiar deficiencies of the pre-reform system effectively nullified the intentions of the *Svod Zakonov* (1857), the structure of litigation in Russian civil procedure by mid-nineteenth century, as codified in 1857, reflected the principles of adversarialism in crucial respects. Bhat, “The Consensual Dimension of Late Imperial Russian Criminal Procedure: The Example of Trial by Jury,” in Solomon (ed.), *Reforming Justice in Russia*, p. 79, note 27.
- 135 Ibid., p. 67.
- 136 Ibid., p. 70.
- 137 Kazantsev, “Judicial Reform of 1864 and the Procuracy,” p. 57.
- 138 On the different components of legal guilt under post-reform procedure, see note 58.
- 139 Vladimirov, *Uchenie ob ugovolnykh dokazatel’stvakh*, p. 94.
- 140 *Ust. ugol. sudoproiz.*, arts. 690–95. These articles define the role of experts at the court session.
- 141 Ibid., art. 581. The article states: “The defendant, their defense attorneys, individual accusers [*chastnye obviniteli*], witnesses, knowledgeable people, and all individuals invited to the judicial investigation are summoned to the court by [the same] subpoena [*povestka*], established for calling forth those individuals to the preliminary investigation (arts. 377–86).”
- 142 *Ust. ugol. sudoproiz.*, art. 690.
- 143 Ibid., art. 692.
- 144 See, for example, Leo Tolstoy, *Resurrection*, trans. Rosemary Edmonds (London: Penguin Books, 1996 [1899]), esp. pp. 99–103.
- 145 *Ust. ugol. sudoproiz.*, art. 692.
- 146 *Resheniia ugovalnogo kassatsionnogo departamenta Pravitel’stvuiushchego Senata*, 1867, no. 204, po delu Protopopova (Ekaterinoslav, 1910). The following chapter examines more closely the circumstances that led to this landmark ruling and the Protopopov case upon which it was based.
- 147 *Ust. ugol. sudoproiz.*, art. 695.
- 148 Vladimirov, *Uchenie ob ugovolnykh dokazatel’stvakh*.
- 149 On the principle of collegiality as a distinctive characteristic of Russian legal culture, see Bhat, “Trial by Jury,” esp. pp. 58–64.
- 150 *Ustavy, Uchrezhdenie Sudebnykh Ustanovlenii* (Statute on the Court), arts. 77–79 and 140.

- 151 *Ust. ugol. sudoproiz.*, art. 701 (on the presiding judge's authority to alter the structure or sequence of witnesses' testimony), art. 750 (on formulation of questions for the jury). The "list of questions" pertained to the accused's guilt or innocence, in accordance with Russia's three-part question of guilt discussed above (see note 58). The three questions were to be combined into one comprehensive question regarding the accused's culpability (*vinovnost'*) when no doubt arose regarding the occurrence of the criminal act, or the grounds for declaring the defendant guilty of it. In the event of doubts concerning any one of the three questions, they were to be posed separately (art. 754). The jury also received questions pertaining to the defendant's degree of guilt (art. 755).
- 152 Bhat, "Consensual Dimension," p. 69.
- 153 Levin-Stankevich, "Transfer of Legal Technology," p. 235; and Wagner, "Tsarist Legal Policies," pp. 376–77.
- 154 Solomon, "Courts and their Reform," p. 6.
- 155 Exceptions were made only for felony violations or through disciplinary decisions of superior court judges.
- 156 F.A. Patenko, "O reorganizatsii sudebno-meditsinskoi ekspertizy," *Meditsina* 5–6 (1892): 7.
- 157 Crawford, "Emergence of English Forensic Medicine," pp. 150–60.
- 158 Ibid.
- 159 On the Russian borrowing of the French adaptation of the English jury system, see Butskovskii, *O prigovorakh po ugovolnym delam*.
- 160 See *Ust. ugol. sudoproiz.*, arts. 713–17 for oath procedure for witnesses. There was also contention over this rule in the Editing Commission, which drafted the judicial reform statutes. Deliberations followed the same majority/minority lines discussed in Chapter 3.
- 161 *Ust. ugol. sudoproiz.*, art. 694.
- 162 Ibid., art. 977.
- 163 Ibid., art. 978.
- 164 Ibid., art. 987.
- 165 On the different political investments in the jury trial, see Baberowski, *Autokratie und Justiz*, esp. chapter 3. According to Baberowski, even in the face of the jury's flawed performance in respects (which he partly attributes to high illiteracy among jurors), liberals were reluctant to criticize it, seeing the jury trial as a constitutional institution in embryonic form (so far as it was a limitation on unrestrained autocratic authority) and a form of political participation. At the other pole, conservatives assumed it was opposed to the regime.

## CHAPTER 5

## Reform and the Role of Medical Expertise

- 1 Indeed, a change of political tone and the strengthening of autocratic authority could be seen in policies under Alexander III (1881–1894) that reversed reforms in key areas such as censorship (1882), education (1884) and local government (1890), as well as the reestablishment of firm police powers with the “temporary regulations” of 1881. My argument is not to deny that this cluster of policies reflected a common political direction, but to suggest that the judicial reform was under scrutiny from both sides and subject to revision from its onset—rather than a smoothly humming reform that satisfied supporters’ expectations, had it not fallen victim to a governmental *volte-face* in the 1880s.
- 2 V.P. Bezobrazov, “Mysli po povodu mirovoi sudbenoi vlasti,” *Russkii vestnik* 65 (1866): 369.
- 3 Nicholas Riasanovsky has called it the “most successful of the ‘great reforms’.” Riasanovsky, p. 418; Richard Wortman credits the reform with creating a modern judicial system and introducing the “necessary preconditions” for the rule of law in Russia, Wortman, *Development of a Russian Legal Consciousness*, p. 269; and Laura Engelstein concludes that the innovations of 1864 constituted the elements of a *Rechtsstaat* and “reshaped the disposition of power within society itself: the formerly servile class now entered the body politic, in which the opportunity to participate in the exercise of power and authority was significantly enhanced.” Engelstein, *Keys to Happiness*, p. 17.
- 4 Implemented under Alexander III, the policies of the so-called counter-reforms aborted the system of peace courts throughout most of the country in 1889, when their functions became part of the administrative duties of the *zemskie nachal’niki*, or land captains, who were appointed by the Ministry of Internal Affairs. Sutton, “Crime and Social Change,” pp. 10–11. With regard to the jury, practical reprisals against the jury were carried out in 1878 in the wake of controversial decisions pronounced by the jury in overtly political cases, the most well-known and oft-cited being the Vera Zasulich case. These reprisals took the form of gradually removing from the competence of the jury more and more cases involving crimes against the state. The competence of the jury was severely limited in 1889 when several types of important cases were transferred to the courts with estate representatives. See Atwell, “The Jury System,” p. 8.
- 5 Ibid.; and Wortman, *Development of a Russian Legal Consciousness*. While contemporaries *perceived* an exceptionally high rate of acquittals by the jury courts (and subsequent threat to the social and political order), historians have shown this fear to be unfounded, and that the Russian jury was work-

ing “quite satisfactorily” and without exceptional acquittal rates. See *idem*; and Atwell, “The Jury System,” pp. 164–85. On reaction of conservative circles and the press to the jury’s activity, see Aleksander K. Afanas’ev, “Jurors and Jury Trials in Imperial Russia, 1866–1885,” in Eklof et al. (eds.), *Russia’s Great Reforms*, pp. 214–30.

- 6 I use the term “medical expert” as a less cumbersome, and more familiar (to readers) variant of the term that Russian contemporaries used most frequently after the reform, “physician-expert.” However, there was never any consistency in terminology or usage up to the end of the century, with various labels used interchangeably such as “physician-expert,” “expert-physician,” “specialist-expert,” “expert-*medik*” and by the 1880s, “expert-psychiatrist” (*psikhiatr*). The term “expert” was not indigenous to Russian legal terminology but introduced through foreign (German and French) medico-legal works in translation at the middle of the century.
- 7 For an insightful analysis of the rule of law as an international, exportable concept, but which at the same time is necessarily produced at the national level “to make national sense,” see Yves Dezalay and Bryant G. Garth, “Legitimizing the New Legal Orthodoxy,” in Dezalay and Garth (eds.), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002), pp. 306–33. Rather than view the rule of law as a “recipe,” the authors make the case for seeing “law” more generally as “a changing crossroad where different actors and different sources of legitimacy can meet. At a crossroad, law draws on varying amounts and kinds of social capital.” However the Russian case does not prove an easy fit in their model, as they claim that law is “a vital resource for dominant groups to legitimate their power and authority.” In imperial Russia, jurists and physicians who sought to reshape the rules of legal process had neither political or economic power, nor were they dominant groups. For this reason, the Russian case offers a unique example of how the very utility of law and legal processes—what it offers the groups seeking to shape it—is not a universal.
- 8 This view contrasts with the standard historical picture of professionalization in Russia, which has emphasized the efforts of different occupational groups in the reform era to distance themselves from the state in its various manifestations. In this depiction, the shaping of professional identity is viewed as a process in which specialists affiliated their aims with the creation of an independent, if nascent civil society, and at odds with the state system, to which they were traditionally attached. See Balzer (ed.), *Russia’s Missing Middle Class*; and with regard to physicians in particular, Frieden, *Russian Physicians*.
- 9 This account of the assassination attempt is based on the newspaper reports of *Golos* (1866), nos. 94 (6 April); 97 (9 April); 98 (10 April); and 102 (14 April).



- 10 Melancholy was the most common form of mental disorder introduced by physicians in criminal trials in the first years of the reform, based on my examination of criminal cases with physicians that appeared in *Arkhiv sud. med.* from 1867 to 1871.
- 11 Gessen, *Sudebnaia Reforma*.
- 12 Melancholy was one of an exhaustive list of physical and emotional conditions that were defined in official rules as leading to “frenzy,” which itself was an official condition of legal non-responsibility (*nevmeniaemost'*). (See note 46 for list of other conditions leading to frenzy.) *Pravila otnositel'no sviditel'stvovaniia i ispytaniia tekhn, koi v pripadkakh sumasshedstviia uchinili smertoubiistvo, ili poshiaguli na zhizn' drugogo ili sobstvennyiu. Sostavleniia Meditsinskim Sovetom dlia rukovodstva Vracham i odobrenniia Gosudarstvennym Sovetom* (St. Petersburg, Medical Department of the Ministry of Internal Affairs, 1835).
- 13 One site of conflict was the jurisdiction over matters of state order. In 1866, the Ministry of Internal Affairs sought to strengthen the power of governors' supervision in the provinces, giving them authority over officials of the judiciary in matters concerning state order and security. The Minister of Justice, D.N. Zamiatnin, objected. There was also conflict regarding press cases. For the first time, press violations were subject to judicial control. Minister of Internal Affairs P.A. Valuev insisted that procurators should share the view of the press administration, and the administration sought control over the press and procurators. See Wortman, *Development of a Russian Legal Conscience*, pp. 71–273, and Gessen, *Sudebnaia reforma*.
- 14 Gessen, *Sudebnaia reforma*, p. 137.
- 15 The key point about these commissions is that administrative officials participated and played a role in determining defendants' mental condition, and ultimately, legal responsibility (i.e., punishability). The commissions also determined mental capacity for civil purposes. Moreover, as Russian physicians complained, the opinions of administrative officials were given comparable weight to those of physicians. See *Moskovskaia Meditsinskaia Gazeta* 17 (1877): 554. Besides physicians, those present were the governor, the vice governor, and the chairman of the court chambers, art. 368 t. X. This administrative process was incorporated under the reform, under the preliminary investigation rubric. Thus, though the commissions now took place under the courts (albeit without Ministry of Internal Affairs officials), the procurator could still determine whether this preliminary mental examination was necessary and submit his opinion on the matter; he could also decide whether it was necessary to terminate the case before it went to trial. Through this examination process/administrative vestige, the state retained a hand in such decisions. On the composition of these commissions, and process for examining the potentially insane offender, see A. Askochinskii, “Ob osvidetel'stvovanii umalishennykh po deistviushchim v Rossii zakonam,” *Arkhiv*

- sud. med.* 3 (1866): 25–47. (The process, in brief, consisted of asking a series of prescribed questions, such as “what is your name,” “do you have a family,” designed to identify the two original (severely marked) forms of insanity that precluded legal responsibility (*bezumie* and *sumasschestvie*). Nineteenth-century Russian medical terminology maintained a distinction between insanity one is born with (*bezumie*) and insanity which develops later in life (*sumasschestvie*). Under this arrangement, defendants with less pronounced forms of insanity (based on the 1835 rules, see note 46)—in which the capacity to reason (or answer properly) was undisturbed—easily slipped past the commission and made it to trial.
- 16 Historians of the judicial reform have generally described the Protopopov case as illustrating how the courts came to be perceived as hostile to the needs of the administration. See, for example, Gessen, *Sudebnaia reforma*; and Wortman, *Development of a Russian Legal Consciousness*. Atwell refers to the Protopopov case as one of the famous cases, including the Zasulich case, that set off practical reprisals against the jury in 1878. Atwell, “The Jury System,” p. 8. None of these historians mention the role that physicians or medical testimony played in the case, nor the broader consequences of the case for medical expertise.
  - 17 The information about this case is based on “Delo po protestu prokurora s.-Peterburgskago okruzhnago suda po delu o chinovnike Protopopova, sudi-mom za oskorblenie dolzhnostnago litsa,” *Arkhiv sud. med.* 3 (1867): 106–31 (hereafter “Protest”); trial transcript in *Sudebnyi vestnik* 68 (1867); and *Resh. ugol. kass. dept.* 204 (1867): 204.
  - 18 P.V. Makalinskii was the most prominent investigator of this period. As discussed in Chapter 3, Makalinskii participated in the governmental Editing Commission that drafted the judicial reform statutes and was the author of the sole and often-cited guidebook for investigators after the reform, *Prakticheskoe rukovodstvo dlia sudebnykh sledovatelei sostoiashchikh pri okruzhnykh sudakh* (St. Petersburg, 1870). The book’s popularity was reflected in its longevity; it appeared in six editions between 1870 and 1906.
  - 19 Regrettably, there is an absence of statistics for the frequency of expert participation in the new courts. E.V. Pelikan (1824–1884), vice director of the Medical Department, sought to illustrate with comparative, if uneven, figures the newfound significance and widespread application of forensic medicine in criminal cases, and his figures cross into the period of the new courts. From 1861–1866 12,000 autopsies were conducted. Chemical-microscopic investigations of “suspicious stains” were conducted in 1865: 315 times, in 1866: 417 times, and in 1867 (up to December): 379 times; forensic-chemical investigations of poisons were conducted in 1862: 320 times, in 1863: 346 times, in 1864: 416 times, in 1865: 449 times, in 1866: 444 times, and in 1867 (until the end of December): 550 times. With regard to forensic-psychiatric questions, in Pelikan’s words, “[s]uffice it to say that in Russian

- courts the question of the accused's mental illness was initiated in 800 cases annually." Pelikan, "O znachenii estestvennykh nauk," p. 45. This dearth of statistics continued into the 1890s, when a physician referred back to these same figures from 1868 to make his point.
- 20 All crimes punishable by the deprivation of all civil or all special rights and privileges were to be tried in the circuit court before a jury. Uchrezhdenie sudebnykh ustanovlenii, *Sudebnye ustavy* (1867), article 201. As far as volume, the circuit courts heard cases against more than 50,000 defendants a year. Sutton, "Crime and Social Change," p. 10.
  - 21 On the early courts, see, Sutton, "Crime and Social Change"; on the press, see Louise McReynolds, *The News under Russia's Old Regime: The Development of a Mass-Circulation Press* (Princeton: Princeton University Press, 1991).
  - 22 M.G., "Perechen ugolovnykh del s uchastiem vrachei-ekspertov," *Arkhiv sud. med.* 2 (1868): 98.
  - 23 *Ulozhenie o nakazanniakh ugolovnykh i ispravitel'nykh* (1845) pt. I, chap. III, art. 102. "Those acts are not imputable that are committed by an ill person in a precisely-proven attack of frenzy [*umoiztuplenie*] or complete unconsciousness...." This definition also encompassed those illnesses that led to frenzy (as defined in the 1835 rules, see below note 46), and in other parts of the criminal code, the definition is stated as "fits of illness that accompany frenzy or unconsciousness."
  - 24 To be sure, it was not uncommon for the official preliminary examination to be skipped over in the early years of the reform, among other breaches of official procedure. See, for example, R. Iakubovskii, "O sudebnoi-psikhiatricheskom osvydetel'stvovanii krest'ianina Pavlova," *Arkhiv sud. med.* 3 (1870): 68–73. In the Protopopov case, it may not have been an oversight. According to article 1080 of the reform statutes (*Ust. ugol. sudoproiz.*), when a crime was committed by a service individual against authorities, the investigation was overseen by that body of authority. Thus the investigation of the Protopopov case was overseen by the Ministry of Internal Affairs. Minister of Internal Affairs Valuev had previously made his feelings clear about the Protopopov case, wanting Protopopov removed as a public example of insurrection against official authorities. Given the available evidence regarding the investigation, combined with accounts of Valuev's personal interest in the case, it is difficult to dismiss the possibility that the preliminary examination of Protopopov's mental condition was deliberately circumvented in the interest of bringing the case to public trial.
  - 25 Melancholy was one of the four main forms of mental illness according to nineteenth-century classification, and was regarded by contemporary Russian physicians as "chiefly an illness of the will" (in other words, this illness affected one's ability to control his/her actions, even when his/her intellectual abilities were undisturbed). Askochinskii, "Ob osvydetel'stvovanii

umalishennykh,” p. 40. According to other contemporary Russian medical literature, melancholy was defined as “the condition of depression.” Commentaries that accompanied cases often included definitions of melancholy from foreign sources. Mittermaier discussed this category in the context of “transitory” mental conditions which lead to non-responsibility. Such conditions included types of “frenzy” in which the ill one, primarily “as a consequence of prolonged melancholy, loses the ability to judge his actions, anticipate their consequences, recognize the illegality of them, and in this way, commits an act which he never would commit in a healthy condition.” “Delo o riadovom Aleksandre Floriu,” *Arkhiv sud. med.* 2 (1867): 147.

26 “Protest,” p. 111.

27 That is, the legal conditions of non-responsibility. Trial transcript, *Sudebnyi vestnik* 68.

28 “Protest,” p. 127.

29 *Sudebnyi vestnik* 68.

30 The legal formulation of *nevmeniaemost'* first appeared in Russian law in the 1845 criminal code (*Ulozhenie o nakazaniakh ugovolnykh i ispravitel'nykh*), see above note 23. This formulation, with regard to mental competence, extended across articles 103, 104, and 105 in the 1857 edition (renumbered 95, 96, and 97 in the 1866 and 1885 editions). A revised formulation based on the medical viewpoint appeared as article 39 of the *Ugolovnoe Ulozhenie* in 1895 (officially approved in 1903, though never enacted). Article 39 stated that an offender was not responsible if, at the time of committing a criminal act, he was unable to understand the character or significance of the act or control his behavior as a consequence of mental disorder, an unconscious state, or mental deficiency. This definition was formulated by leading jurists on a governmental editing committee, including scholars N. S. Tagantsev and I. Ia. Foinitskii, with the participation of psychiatrists, and its two elements—understanding and control—reflected contemporary European thought. This formal category of intellectual and volitional criteria for criminal responsibility has endured to the present. The core formulation of 1895 was retained through the Soviet period (RSFSR Criminal Codes of 1938 and 1960) and continues to be included in the present-day Criminal Code. *Ugolovnyi Kodeks*, art. 21, *Sobranie Zakonodatelstva Rossiiskoi Federatsii* 1996, no. 25, item 2954. On the original formulation as stated in *Ulozhenie o nakazaniakh* (1857), see G.V. Morozov, D.R. Lunts, and N.I. Felinskaia, *Osnovnye etapy razvitiia otechestvennoi sudebnoi psikhiiatrii* (Moscow, 1976). On the discussion surrounding the drafting of article 39 (the 1895 formulation), see N.S. Tagantsev, ed., *Ugolovnoe ulozhenie 22 marta 1893 g.*, (St. Petersburg, 1904). On the full composition of the editing committee, see “Obozrenie khoda rabot, po sostavleniiu ugovalnogo ulozheniia” (St. Petersburg, 1903), rpt. *Ugolovnoe ulozhenie (stat'i vvedennye v deistvie)*, ed. D.A. Koptev and S.M. Latyshev (St. Petersburg, 1912).

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- 31 *Sudebnyi vestnik* 68.
- 32 Ibid.
- 33 *Vest'* was the organ of the Ministry of Internal Affairs. Valuev collaborated in that journal, which took a conservative line and published attacks on the independent judiciary—some of which were written to his order. Wortman, *Development of a Russian Legal Consciousness*, p. 273; and Gessen, *Sudebnaia Reforma*, pp. 135–37.
- 34 Wortman, *Development of a Russian Legal Consciousness*, p. 277. In Wortman's words, "Zamiatnin's departure also marked an end of the period of assertive leadership by a minister committed to the judiciary."
- 35 Count Constantine Ivanovich Pahlen had never served in a judicial office before being appointed assistant minister of justice, on his way to taking over the top post.
- 36 Diary entry of A.V. Nikitenko of 12 June 1867, cited in Gessen, *Sudebnaia Reforma*, pp. 161–62.
- 37 The apex of Russia's reformed judicial pyramid, the Cassation Department was the major post-reform source of legal revision in the form of decisions intended to clarify the law, in order to provide guidance for the lower courts. Historians generally agree that Cassation decisions, officially non-binding, operated to an extent as a *de facto* system of precedent. The most extensive treatment of the role and structure of the Cassation departments can be found in Levin-Stankevich, "Cassation."
- 38 See, for example, the cases, "O sudebno-psikhiatricheskom osvidetel'stvo-vanii krest'ianina Pavlova" (3 April in Vladimir district court), *Arkhiv sud. med.* 3 (1870): 68–73; and "Delo o riadovom Aleksandr Floriu," *Arkhiv sud. med.* 2 (1867): 140–48; and for commentary on this confusion, see M.G., "Est' li razlichie mezhdru sudebnym vrachem i vrachem ekspertom," *Arkhiv sud. med.* 4, ot d. V (1867): 1–6. Against this confusion, physicians called for the need to invite "specialists" as experts, rather than those officially assigned forensic duties, particularly in psychiatric questions; and the term expert soon came to replace "forensic physician" in reference to those physicians who testified at court.
- 39 In the pre-reform period, as we have seen earlier in this book, forensic responsibilities were assigned by law to state physicians (city, district, and police physicians). This 1797 rule was incorporated under the reform (*Ust. ugol. sudoproiz.*, art. 336) under the rubric of the preliminary investigation only. With regard to the trial phase, the reform made no positive indications as to which types of physicians had to be called, and allowed that any physician could be called.
- 40 "Protest," p. 111.
- 41 Ibid., p. 113.
- 42 Ibid.
- 43 Ibid., p. 130.

44 Ibid., pp. 129–30.

45 Ibid., p. 119.

46 The following are the 1835 rules, which list the conditions that could lead to the condition of “frenzy” and thus non-responsibility. Emphases as in original.

“The causes *which produce* frenzy: prolonged mental activity; despondency; longing [*toska*] for one’s fatherland and other oppressive passions; sudden change of temperature of the air; damp, cramped, putrid air; exhaustion of bodily strength from loss of blood and other fluids important for animal economy; stopping of habitual bleeding, release of milk, and other fluids; accumulation of abdominal organs; excessive use of alcoholic drinks; eating rabid animals; prior births; stopping of cleansing and other such harmful influences; [things that] intensely affect the nervous system.”

“*Accidental and moral* causes: intense and sudden mental shock, grief, sadness, despair over the loss of children and property; having one’s hope and love betrayed; intense jealousy; unfulfilled ambitions; extreme strain of the mind; blind fanaticism and pangs of conscience. *Physical* causes: different injuries of the skull, internal and external, such as: bruises, battering in, breaks, wounds, growth/tumors, capricious manner of life; prolonged lack of sleep; hunger; depletion of strength from drunkenness and loss of semen; sudden concealment of severe and chronic rashes; the same type of concealment of recurring wounds and festering; sudden cessation of hemorrhoid and uterine bleeding; sudden cessation of milk and birthing purification, etc.”

“*Predisposing* causes: melancholic and choleric temperaments; hot-tempered and vindictive character; frequently recurring and so-called white fever [*belaia goriachka*]; falling sickness (epilepsy); hypochondria; inflammation of the brain and hereditary disposition/constitution [*nasledstvennoe raspolozhenie*].”

“Besides the two pathological forms of mental disorder [designated in law as leading to non-culpability], the Medical Council allowed four more forms: 1) *Feeble-mindedness* [*slaboumie*] the consequence of masturbation, falling sickness, frequently recurring white fevers (f. methistica), organic distress of the cranial arch and other idiopathic distress of the brain; 2) *Periodic insanity* [*periodicheskoe umopomeshatel'stvo*, mania transitoria, periodica]; 3) *Single-subject insanity* [*odnopedmetnoe umopomeshatel'stvo*, monomania]; 4) *Melancholy* [*melankholiia*].

47 The Ministry of Justice disseminated a strongly worded circular to procurators attached to the judicial chambers. *Tsirkuliar g. upravliaiushchago ministerstvom iustitsii gg. prokuroram sudebnykh palat ot 18 Iulia 1867 goda*, za no. 11, 286. This was deemed necessary because “during the oversight of the appropriate precautions for the reliable discovery of the ill or mental condition of the accused, crimes and minor offenses can be either incorrectly

imputed” or, conversely (as in the case of Protopopov) they “can remain without appropriate retribution with clear harm for the safety of society.” The circular ordered that investigators and procurators “give direction” to the investigation, “indicated by the rules laid out in the articles of law (353–56).”

- 48 In these other cases, the prosecution also objected on the grounds that the question of mental condition was left to the jury, and that the official administrative examination was not followed. See, for example, *Resh. ugol. kass. dept.* 86 (1868), Fevralia 7-ogo dnia. Po delu otstavnogo kantseliarskago chinovnika Vasiliia Vinogradova; and *Resh. ugol. kass. dept.* 571 (1867). The Cassation rulings rejected such protests and spoke out strongly against the proposition that insanity should be decided otherwise than by the jury, “it contradicts the very basis of the reform that abrogated the legal theory of evidence.”
- 49 These subsequent cases allowed Cassation judges to complete the transfer of discretion over mental condition (in less pronounced forms) away from the administrative/prosecutorial sphere and into the judicial. The chipping away at the procurator’s points of contact in insanity cases took place from other legal corners as well. As one example, see *Iuridicheskii vestnik* 6 and 7 (June and July 1872).
- 50 This trend culminated in an 1869 Cassation decision, which effectively curtailed any remaining strength of the preliminary administrative examination of mental condition, and placed full authority over all ambiguous or “not obvious” cases of mental disorder in the hands of the jury. In the court’s words, “the recognition or non-recognition of such grounds for non-responsibility ... is presented to the court in almost all [foreign] legislation.” *Resh. ugol. kass. dept.* 877 (1869). This decision was reinforced by *Resh. ugol. kass. dept.* 283 (1874), which stated:

“If during the preliminary investigation, during the examination of the accused in the district court (art. 353), experts diagnose that the crime was committed by him in a fit of frenzy or complete unconsciousness then this does not serve as grounds for the termination of the case, but, on the contrary, the accused must be brought to court, since ‘frenzy’ and ‘complete unconsciousness’ is a temporary condition which, in art. 96 of *Ulozh. o nak.*, must be precisely proven and can be recognized only by the court, which lays a verdict. The Judicial chamber [which was the base of the procuracy] terminates a case only in that case when the crime cannot be recognized as the product of logical will and by which reasons can be recognized only full *sumasshestvie* or *bezumie* [insanity].”

Significantly, this Cassation decision was bundled with others that also curtailed the procuracy’s authority to terminate cases under circumstances other than insanity, suggesting an overall effort to limit the procuracy’s traditional leverage within the judicial process.

- 51 As Gessen attested, public reaction was largely due to “the acquittal of defendants who confessed.” Gessen, *Sudebnaia Reforma*, pp. 161–62. To be sure, there were also publications that supported the innocence of purportedly mentally ill defendants, such as the St. Petersburg daily, *Golos*. Louise McReynolds, *News under Russia’s Old Regime*, p. 42.
- 52 “Delo ob otstavnom kantseliarskom sluzhitele Fedore Alekseeve, obviniaemom v predumyshlennom ubiistve zheny svoei, Mar’i Mikhailovoi.” Zasedanie 12 Maiia v Moskovskom okruzhnom sude. *Arkhiv sud. med.*, p. 160. In the first years of the new courts, the parallel mid-century controversy in Russia involved categories of mental disease (such as melancholy or frenzy) that dated back further (to classical models) than the contested “monomania” in the French 20s. Yet there was an intellectual lineage between these categories, and the core notion that spurred public reaction was the same in both cases: an individual could appear to reason well, and show no signs of intellectual disturbance, but be unable to control his/her actions. On history of the medical category of “melancholy” and its relation to later psychiatric categories, see E. H. Ackerknecht, *A Short History of Psychiatry* (New York: Hafner Pub., 1968). On the meanings of “frenzy” and “melancholy” in classical antiquity, see David Healy, *Mania: A Short History of Bipolar Disorder* (Baltimore: Johns Hopkins University Press, 2008), pp. 1–23. For the complete analysis of the debates concerning madness and law in early eighteenth-century France, particularly in relation to the monomania concept, see Goldstein, *Console and Classify*, pp. 152–96.

Even as Russian physicians incorporated more recent medical/psychiatric categories in their court testimony in subsequent years, the question of mental condition was still posed to the jury according to the original 1835 terms that remained part of the criminal code’s legal definition of non-responsibility. For example, in one 1883 case, the psychiatrist-expert testified that a defendant suffered from hereditary degenerative psychosis, but the jury was asked whether the defendant committed the crime “in an ill condition that led to a fit of frenzy.” These antiquated legal categories coexisted in physicians’ testimony with new imported views of mental illness through the 1880s, although physicians did argue for the need to revise the criminal code’s definition in keeping with current medical understandings. V.Kh. Kandinskii, “Sluchai somnitel’nago dushev’nago sostoiianiia pered sudom prisiazhnykh. Delo devitsy Iulii Gubarevoi,” *Arkhiv psikiatrii, neirologii i sudebnoi psikhopatologii* 2 (1883): 1–70.

- 53 There was an ample press devoted to the coverage of criminal cases in the new courts. See David Keily, “*The Brothers Karamazov* and the Fate of Russian Truth: Shifts in the Construction and Interpretation of Narrative after the Judicial Reform of 1864” (PhD thesis, Harvard University, 1996), esp. chapter 2. This press likewise introduced the notion of non-responsibil-



- ity (based on mental condition) to the reading public as well as serving as a medium for criticism of the expert and his psychiatric categories. See, for example, “K delu ob ubienii Kicheevym studenta Kossakovskago (v Moskve),” *Golos* 112 (24 April 1866), section “Sudebnaia Khronika,” p. 3.
- 54 Cases of bureaucrat Protopopov, novice (eccles.) Medvedev, and chancellery clerk Alekseev.
- 55 *Moskva* 110 (1867). The cases the author was referring to were Protopopov and Alekseev, respectively.
- 56 Ibid.
- 57 P.R., “Glasnyi sud.”
- 58 In the first years of the reform, full reports about cases appeared in *Sudebnyi vestnik* and in the court chronicles of similar newspapers. These reports included the “chairman’s résumé.” Eventually these reports became shorter and shorter and the first victims of this brevity were the résumés, and thus, the opportunity to follow how the reception of physicians and their testimony changed over time. However, as one contemporary described their contents: “Judging by the reports, the questions about the significance of expertise were interpreted in the most general and abstract form, without differentiation of the separate moments which comprised it.” V.Ia. Fuks, “Ugolovno-sudebnaia ekspertiza,” Part II, *Zh. gr. i ugol. prava* 5 (1887): 9.
- 59 “Delo o krest’ianke Praskov’e Filipovoi, obviniaemoi v namerenii otravit’ svoego otsa i sestru, Agaf’iu Filipovu, razsmotrennoe v moskovskom okruzhnom sude,” *Arkhir sud. med.* 2, otd. II (1868): 101.
- 60 M.G., “Perechen,” p. 97.
- 61 Koni, *Na zhiznennom puti*, p. 360.
- 62 Born in 1844 and the son of a writer and publicist and of a prominent actress, A.F. Koni graduated from the juridical faculty of St. Petersburg University and in 1867 entered the judicial service, where he served primarily as an assistant procurator and procurator before becoming chairman of the St. Petersburg District Court in 1877. He later served as Chief Procurator and then as a senator in the Criminal Cassation Department of the Senate.
- 63 Koni, *Na zhiznennom puti*, p. 360.
- 64 “Delo o krest’ianine Gavriile Svinare, obviniaemom v nanesenii krest’ianinu Vasiliuu Svinariu, po neostorozhnosti, udara, ot kotorago poslednii umer, razsmotrennoe v kharkovskom okruzhnom sude,” *Khark. gub. Vedom.* nos. 31, 32, and 34 (1868).
- 65 “Delo o zhene riadovago Natal’e Sergeevoi, obviniaemoi v pokushenii na ubiistvo svoego muzha, razsmotrennoe v kashinskome okruzhnom sude,” *Arkhir sud. med.* 3 (1870). For trial transcript see *Sudebnyi vestnik* 33 (1869).
- 66 Ibid.
- 67 Ibid., p. 42.
- 68 Ibid.

- 69 F. Ergardt, *O polozhenii vrachei-ekspertov* (1874); and F.V. Vislotskii, *O dostoinstve sudebno-meditsinskoi ekspertizy v ugovnom sudoproizvodstve* (Warsaw, 1872), respectively.
- 70 “Perechen’ ugovnykh del s uchastiem vrachei-ekspertov,” *Arkhiv sud. med.* 2 (1868): 107.
- 71 For a clear example of this initial confusion regarding the physician’s status, see “Delo o gzhatskom meshchanine Petre Vereitinove, proizvodivsheesia v 1-om otdelenii s.-Peterburgskago okruzhnago suda,” *Arkhiv sud. med.* 4 (1866). Presiding judges did not discriminate when it came to the indignities. One of the many voices to complain was internationally known chemist D.I. Mendeleev, who on a number of occasions was invited to serve as an expert at court. In a letter to the editor of *Sudebnyi vestnik*, Mendeleev complained of being “locked in a room with witnesses” for hours, until he was “called back to court at 1:00 a.m.!” And then, he was not allowed to express his conclusions freely, but forced to address “only the specific, narrow questions that the parties presented to him.” See D.I. Mendeleev, “Ob ekspertize v sudebnykh delakh,” Letter to Editor in *Sudebnyi vestnik* 291 (29 October 1870). Physicians’ demands to clarify and bolster their status pertained both to the pre-trial investigation and trial phase. On their arguments, see Becker, “Judicial Reform.”
- 72 Notwithstanding courtroom conflicts between physicians and jurists, the issue of medical *ekspertiza* drew the two groups together; jurists no less than physicians expressed a vested interest in the improvement of medical *ekspertiza* for the overall success of the reform and goal of justice. As one example, defense lawyer N. Sokolovskii proposed the institution of a “society” or “circle” (*kruzhok*) (“call it as you wish,” he wrote) to involve those “engaged or interested in forensic medicine,” and unite the full array of legal and medical actors under the common purpose of working out the problems of *ekspertiza*. As he envisioned it, the society would be a vast umbrella, bringing together “physicians, pharmacists, chemists, judges, professors, defense lawyers, investigators, procurators, etc.” Unique in kind, and unprecedented in the diversity of occupations it would bring together—such an organization would most certainly meet with disapproval from a government wary of even the most basic, homogenous forms of association. However, it was the society’s broader objective—which coincided with state interests—that would buffer and protect it, in Sokolovskii’s view. “The realization of such a society could hardly meet any kind of obstacles in terms of receiving the government’s sanction. Since the goal of the society is to assist the matter of justice, then already from this side of its existence not only is it not offensive/oppositional (*protivnyi*), but it is desirable in the eyes of the government.” See N. Sokolovskii, “Odna iz potrebnosti v dele suda,” *Golos* 310 (1870).
- 73 Leonid Vladimirov described his motivation for pursuing this topic as the troubled start of the judicial reform. He specifically mentioned the

Protopopov case and other sensational insanity-based trials; the ensuing public attack on physician-experts (particularly the aforementioned *Moskva* article); the attacks on the jury for such acquittals; and the widespread courtroom confusion over the physician's role and treatment as witness. L.E. Vladimirov, *O znachenie vrachei-ekspertov v ugovnom sudoproizvodstve* (Kharkov, 1870), pp. 6–10.

- 74 Vladimirov presented his dissertation at Kharkov University for the degree of Magister of Criminal Law. Vladimirov, *O znachenie vrachei-ekspertov v ugovnom sudoproizvodstve*.
- 75 Vladimirov's interests in science and law began from his earlier years as a student. He continued to elaborate them throughout his quarter-century academic career at Kharkov University, where he was both a graduate and later a professor. Born in 1844, Leonid Evstaf'evich Vladimirov attended *gimanzii* in Poltava. He received his degree of *doktor* of Criminal Law degree in 1872 with the publication of a book on the jury court, *Sud prisiazhnykh. Usloviia deistviia suda prisiazhnykh i metod razrabotki dokazatel'stv* (Kharkov, 1873). He became a chaired professor in 1874, and after being confirmed as an emeritus professor in 1892, retired in 1893. His support for forensic medicine was unflagging, and he remained a devout advocate of forensic medicine right up to the end. In May 1890 (three years before his retirement) he presented a paper about the need for the introduction of a special teacher of forensic medicine on the law faculty. During his tenure, he taught criminal law and procedure, and parts of police law. In addition, he travelled abroad which, by his own accord, also shaped his thinking about science. L.E. Vladimirov, *Zashchititel'nyia rechi i publichnyia lektsii* (Moscow, 1892), p. 95. He went abroad twice, in 1870–1872 and 1878, the latter time with the goal “to study special scientific questions.” *Khar. Iur. Fak.*, pp. 128–29. Other publications include: *Psikhicheskiiia osobennosti prestupnikov po noveishim izsledovaniiam* (Moscow, 1877); *Uchenie ob ugovnykh dokazatelstvakh, chast' obshchaiia* (Kharkov, 1882, 1889); *Uchebnik russkago ugovnago prava, chast' obshchaiia* (Kharkov, 1889); *Zashchititel'nyia rechi i publichnyia lektsii* (Moscow, 1892); *Psikhologicheskoe izsledovanie v ugovnom sude* (Moscow, 1902); *Ugovnyi zakonodatel' kak vospitatel' naroda* (Moscow, 1903); and *A.S. Khomiakov i ego zavety Russkoi zemle* (Moscow, 1904).
- 76 L.E. Vladimirov, “Rech', proiznesennaia prof. Vladimirovym na vecher 2-ogo Fevralia,” in *Zashchititel'nyia rechi*, p. 462.
- 77 By his own account, Vladimirov's first trip abroad was highly influential in his thinking about the limits of reform through institutions alone, and in conjunction, initiated a lifelong interest in the biological/psychological study of human behavior. The necessity of studying a person's “passions” and “causes of action” were as important as the perfection of judicial institutions. In his words, “[t]here [abroad] I saw that even under evidently superior institutions, there was much evil in life, and I saw that in my dog-

matism I was mistaken.... I understood that life is made up of institutions and the person with his psychic [*dushevnye*] characteristics.” Vladimirov, *Zashchititel’nyiia rechi*, p. 95.

78 Vladimirov, *O znachenie vrachei-ekspertov*, pp. 135–56.

79 Vladimirov’s position also reflects earlier views stated by physicians on the pages of *Arkhiv sudebnoi meditsiny i obshchestvennoi gigieny*, which Vladimirov was clearly well read in. For example, his position echoes arguments made by Simonich in his 1867 article “Sudebno-meditsinskaia ob’ektivnost’” (discussed in Chapter 2) and prominent Kazan psychiatry professor A.I. Freeze, in “O sudebno-psikhiatricheskikh osmotrakh,” *Arkhiv sud. med.* 1 (1866): 3.

80 On the role of judicial revision by the Cassation Courts, see Wagner, *Marriage, Property, and Law*. For a tracing of the extensive legal revision in the post-reform period, see I.Ia. Foinitskii, *Kurs ugovornogo prava* (St. Petersburg, 1887).

81 Vladimirov, *Uchenie ob ugovornykh dokazatel’stvakh*, p. 187.

82 The first study of the investigation to appear after the reform was A. Kvachevskii, *Ob ugovornom presledovanii, doznanii i predvaritel’nom izsledovanii prestuplenii po Sudebnym Ustavam 1864 goda. Teoreticheskoe i prakticheskoi rukovodstvo* (St. Petersburg, 1866). On the government’s efforts to reform the preliminary investigation, see, A. Vul’fert, *Reforma predvaritel’nago sledstviia* (Moscow, 1881); and Brazol’, *Ocherki po sledstvennoi chasti*, and esp. p. 44 for the particularities of the Russian investigator. For public criticism of the investigator, see *Golos*, nos. 151, 152 (1870). See also note 20 in Chapter 3.

83 A physician of the Medical Section of the Vladimirov Provincial Board saw the medical expert’s function in a similar light. Commenting on a case involving a physician, he viewed the expert’s medical testimony as leaning towards the prosecution. While the commentator urged unbiased opinions, he also added that if one had to lean, it should be towards the defendant. “If a physician, as a human being, cannot avoid passions, then it is better to develop an enthusiasm for compassion for the criminal, than for strictness in the prosecution of the defendant. The latter—that is the business of the *prokurorskii* supervision....” R. Iazhubovskii, “O sudebno-psikhiatricheskom osvidetel’stvovanii krest’ianina Pavlova,” p. 73. See also Simonich, “Sudebno-meditsinskaia ob’ektivnost’,” for the association of the physician-expert with protection of defendant’s interests.

84 Contemporaries understood this to mean, in this context, equal participation and rights for the defense vis-à-vis state prosecution.

85 Discontent with the pre-trial investigation began quickly under the new reform. Official attempts to reform it started in 1869 and continued up to the 1880s. The first governmental commission was formed in 1869, with representatives from the Ministries of Internal Affairs and Justice, under the

chairmanship of Senator Peters. The Commission studied foreign legislation for the investigation phase in English, French, Italian, Austrian, and German codes. The Commission also solicited and collected comments and suggestions from practicing judicial officials (procurators and court chairmen of provinces and capital cities). On these governmental efforts to reform the preliminary investigation, see *Materialy dlia peremotra zakonopolozhenii o poriadke proizvodstva predvaritel'nykh sledstviu. Izdanie ministerstva iustitsii* (St. Petersburg, 1882); and I.G. Shcheglovitov, "Sledstvennaia chast' za dvadtsat' piat' let," *Zh. grazh. i ugol. prava* 9 (1889): 25–35. The linkage between efforts to reform the investigation and the investment of authority in forensic medical expertise culminated at the end of the century: I.G. Shcheglovitov, a central figure in the Investigative Reform Commission of the 1880s, viewed forensic medicine as "the most important factor in the success of an investigation." During his later tenure as minister of justice (1906–1915) Shcheglovitov founded the Office of Forensic Medicine in 1914. Shcheglovitov's creation of this Office is significant in that it reveals another byproduct of the intertwining of forensic medicine and efforts to improve the judicial reform: the institutionalization and reintegration of forensic medical expertise into the fold of the governmental apparatus at the end of the old regime. The forging of this connection was not immune to abuse, as revealed by Shcheglovitov's selection of "cooperative" forensic physicians to testify on behalf of the prosecution in the notorious Beilis affair, in which Shcheglovitov's Ministry of Justice accused Jewish artisan Mendel Beilis of ritual murder in 1911. On the role of medical experts in this case, see Maurice Samuel, *Blood Accusation: The Strange History of the Beilis Case* (New York: Knopf, 1966).

- 86 This can be seen in the fact that he rejected a dissertation, "Dogma and method of the historical view in jurisprudence" because "it did not indicate what the study of the physiological school consisted of." *Iurid. Fak. Khark. Univ.*, p. 89.
- 87 Palumbetskii's dissertation was entitled "About the system of legal evidence of ancient German law compared with Russian Pravda, and the latest Russian laws, which are in close connection with them" (Kharkov, 1844). *Iur. Fak. Khark. Univ.*, pp. 292–93. His works on the new procedure included "Ob ustnom i publichnom sudoproizvodstve" and "O sledstviu v slovesnom i publichnom protsesse." *Iur. Fak. Khark. Univ.*, pp. 294–95.
- 88 Vladimirov, *Uchenie ob ugovolnykh dokazatel'stvakh*.
- 89 *Russkaia Meditsina* 42 (1886): 717.
- 90 See, for example, medical textbooks: A.I. Freze, *Ocherk sudebnoi psikhologii* (Kharkov, 1871); Shtol'ts, *Rukovodstvo k izucheniiu sudebnoi meditsiny* (1885); and legal textbooks: K.K. Arseniev, *Sudenoe sledstvie: Sbornik prakticheskikh zametok* (St. Petersburg, 1871); and Foinitskii, *Kurs ugovolnogo prava*, esp. p. 108.

- 91 Foinitskii, *Kurs ugovnogo prava; Brokgauz and Efron, Entsiklopedicheskii slovar'* "Ekspertiza," (St. Petersburg, 1896); and I.F. Krylov, *Sudebnaia ekspertiza v ugovnom protsesse* (Leningrad, 1963), esp. chapter 4.
- 92 Vladimirov, *Uchenie ob ugovnykh dokazatel'stvakh*, p. 126.
- 93 Ibid., p. 127. Vladimirov was not alone in justifying the role of medical authority in broad terms. A professor and practitioner of forensic medicine writing in the same period also situated the contemporary issue of the expert's role within a wide historical narrative. Kazan physician Gvozdev depicted "experts" as the "interpreters of the translator of truth"—with science defined as the "eternal translator of truth." He argued that people have needed "interpreters" of truth since the beginning of time, and by extension, cast the need for "experts of medicine" as a basic human need, but with a populist cast, defining it as a "people's/folk [*narodnyi*] need." Ivan Gvozdev, "Nechto ob ekspertakh nauku" (Kazan, 1871). Gvozdev (b. 1827) was also of the "crossover" generation of forensic physicians.
- 94 The three views he mentions are: 1) expertise as a "special, independent type of criminal evidence" (represented by German jurist Mittermaier, and later by Russian jurists Foinitskii and Sluchevskii); 2) expert as "scholarly (*uchenyi*) or rational witness" (Eli, Titmann, Shneider, Barshev); 3) expert as "helper of the judge" or extension of the judicial examination (*sudebnyi osmotr*) (Feierbach, Bonne, Spasovich). See Vladimirov, *O znachenie vrachei-ekspertov*, pp. 21–27. Reflecting his main priority, to improve and protect the new judicial system, Vladimirov was equally quick to reject other models that *did* call for expansive medical authority but undermined the new judicial institutions. As such, he rejected alternatives such as medical "tribunals" which he associated with the pre-reform system.
- 95 On France, see Ruth Harris, *Murders and Madness*; on the U.S., see Mohr, *Doctors and the Law*, and Janet Tighe, "A Question of Responsibility"; on England, see Smith, *Trial by Medicine*. Though the Russian judicial reform was based largely on the French system, the actual procedure with regard to the questioning of witnesses (and hence physicians) differed. As Harris explains, "there was no system of cross-examination in France—attorneys were obliged to put questions through the court president." Harris, *Murders and Madness*, p. 133.
- 96 Moreover, German law allowed the mixing of the two roles, that is, "knowledgeable witnesses" could also be, for example, the physician who treated the injured or dead person (the attending physician). In Russia, this mixing of roles was not allowed. See Godlevskii, pp. 75–76; and Shauenstein, *Rukovodstvo k izucheniiu sudebnoi meditsiny*.
- 97 While Germans were most content with their system, Anglo-American physicians often admired Continental forms. Mohr points out how American physicians in the early nineteenth century coveted the state-supported system in France, see Mohr, *Doctors and the Law*. Charles Rosenberg has

- indicated how American physicians in the later decades of the nineteenth century admired European precedents of court-designated experts, and sought such models for the evaluation of the responsibility of criminals. Charles E. Rosenberg, *The Trial of Assassin Guiteau: Psychiatry and Law in the Gilded Age* (Chicago: University of Chicago Press, 1968), p. 67. Indeed by the middle of the nineteenth century, there was a significant “grass is greener” phenomenon, whereby physicians engaged in much cross-national comparison of institutional approaches to medical expertise. For an example of such mid-century discussions, see Ernst Bukhner, “Referat ob uspekhakh sudebnoi meditsiny,” *Arkhir sud. med.* 4 (1866): 1; and lecture of Prof. Lion, in idem, p. 6.
- 98 See Liman, *O neobkhodimosti dlia iuristov izucheniiia sudebnoi meditsiny* trans. from German by N. Lamanskii (St. Petersburg, 1866); and Casper, *Handbook of the Practice of Forensic Medicine*, vol. III.
- 99 For discussion of the tensions surrounding the politically charged and widely disparaged role of the investigator in the Russian context, see Becker, “Judicial Reform.”
- 100 Casper, *Handbook of the Practice of Forensic Medicine*, vol III, p. 185.
- 101 Ibid., p. 183.
- 102 Vladimirov *O znachenie vrachei-ekspertov*, p. 21.
- 103 See in particular Kharkov professor of forensic medicine F.A. Patenko in his article, “O reorganizatsii sudebno-meditsinskoi ekspertizy,” pp. 3–4. His reproach is particularly revealing, since Patenko had studied with the leading European authorities (Hofmann in Vienna, Liman in Berlin, Brouardel in Paris) in 1883–1885. Yet being a strong advocate of Vladimirov’s views, he nonetheless spoke out against the general apathy of such European authorities to this important issue.
- 104 See V. Snigirev, “O znachenii vrachei-ekspertov v ugolovnom sudoproizvodstve,” *Arkhir sud. med.* 1 (1870): 21–29; E.V. Pelikan, review in “Bibliographiia” section, *Sudebnyi vestnik* 85 (1870): 1–2; A.I. Freze, *Ocherk sudebnoi psikhologii*, 2nd ed. (Kazan, 1874). Prominent Kazan professor of psychiatry, Freze was the author of the first textbook on forensic psychology (1871) and in the second edition, as his only addition, he incorporated a new section on *ekspertiza* which was devoted primarily to the views (and endorsement) of Vladimirov. The first Russian text of forensic medicine to be published since Gromov (1832), also included and endorsed Vladimirov’s views, see Shtol’ts, *Rukovodstvo k izucheniiu sudebnoi meditsiny*. The one notable exception to this otherwise uniform reception among physicians was Warsaw physician F. Vislotskii, who expressed his critique in *O dostoinstve sudebno-meditsinskoi ekspertizy*.
- 105 Pelikan, review in *Sudebnyi vestnik*.
- 106 Psychiatrist O.A. Chechott expressed his views vis-à-vis the different camps in the supplement to his translation of Maudsley. Genri Maudsli, *Otvetst-*

- vennost' pri dushevnykh bolezniakh* translated by O. A. Chechott (St. Petersburg, 1875), p. 156.
- 107 On the growth of the number of physicians see Frieden, *Russian Physicians*, pp. 75 and 323, based on *Otchet meditsinskogo departamenta MVD* (St. Petersburg, 1878–1894); on the multiplication of departments in medical faculties, see *Biograficheskii slovar' professorov i prepodavatelei imperatorskago kazanskago universiteta (1804–1904)*, pod. red. N.P. Zagorskina (Kazan 1904); on medical societies see *Meditsinskii obshchestva v Rossii*, edited by I. Neiding (Moscow, 1897). There were 27 medical societies at the end of the 1860s, and more than 40 at the beginning of the 1880s.
- 108 The journal *Arkhiv psikiatrii, neurologii i sudebnoi psikhopatologii* was created and edited by P.I. Kovalevskii, docent (later professor) of psychiatry and nervous diseases at Kharkov University (and contemporary/colleague of L.E. Vladimirov on the law faculty). The application of psychiatric studies to the problem of crime occupied a significant place in the journal's agenda, which Kovalevskii described as following the “study of abnormalities in the nervous life of a person, his illnesses, crimes, conditions of their development and means for eliminating them.” Kovalevskii's interest in forensic issues is consistent with his linkage to Vladimirov and the openness of Kharkov University to the interrelationships of medicine and law. Moreover, the linkage was intellectual. Kovalevskii was a student of psychiatry professor A.I. Freze (Kazan) who was a strong advocate of Vladimirov's views.
- 109 Frieden, *Russian Physicians*, p. 109.
- 110 Frieden's interpretation of physicians' professional mission to distance themselves from the state is based primarily on selected items from the agenda of these meetings, namely, calls a) to minimize state regulations on free association; b) to gain self-regulation over what was deemed “medical-ethical issues,” that is, to eliminate an article in the Criminal Code, which made it a criminal violation for physicians to refuse to render treatment when called upon; and c) to free *zemstvo* physicians in particular from the authority of non-medical *zemstvo* officials. (Notwithstanding the fact that *zemstvo* physicians comprised only 17% of the participants of the Pirogov congresses.) Frieden, *Russian Physicians*, p. 120.
- 111 Over the course of the twelve congresses from 1885–1913, more than 20 papers were devoted to forensic medical questions. Presenting these works were various types of physicians involved in forensic medical activity: professors, inspectors of the Medical Sections of Provincial Administration, and district and city doctors. The geographical representation was equally diverse, though primarily drawn from university cities such as Moscow, Kazan, Kiev, and St. Petersburg. For more on the scientific and organizational topics discussed, see A.M. Gamburg, *Razvitie sudebnomeditsinskoi nauki i ekspertizy, po materialam s"ezdov i soveshchani* (Kiev, 1962). On the



- Pirogov Society's role in the development of the Russian medical profession's service ethos and political activity, see Frieden, *Russian Physicians*.
- 112 Cited in "Kratkii otchet o deiatel'nost f-m kabineta, Univ. Sv. Vladimir za 1889 ucheb. goda" (1891).
- 113 Other issues on the agenda were organizational, including proposals for: the creation of an institute of State Medicine (*gosudarstvennoe vrachebnovedenie*) attached to judicial chambers (*palata*) where physicians would receive special forensic-medical education; the institution under medical faculties of stipends for young physicians who chose to pursue forensic-medical activity; and the institution of the service post of forensic medical-consultant under judicial chambers.
- 114 I.I. Neiding, "O neobkhodimosti bolee tochnago raz"iasneniia polozheniia vrachei-ekspertov v razlichnykh fazakh sudebnogo sledstviia," *Trudy II s'ezda russkikh vrachi v Moskve* (Moscow, 1887), p. 31.
- 115 Smirnov, "Prichiny neudovletvoritel'nago sostoianiia," pp. 52–53.
- 116 Ibid., p. 57.
- 117 *Resh. ugol. kass. dept.* 199. This ruling stated that "although *ekspertiza*, like any other kind of evidence has no kind of conclusive [*preiuditsial'nyi, res judicata*] strength, there is no doubt that in cases in which special, scientific and technical questions are met, *ekspertiza* should be regarded among the most important types of evidence, the strength and weight of which can be shaken only in exceptional cases, for example, when it is conducted by non-specialists on a given subject."
- 118 The government introduced minor but troublesome abridgements of the independence of judges, and strove to curtail the competence of the jury system. There are many summaries of the changes in the court statutes, and attempts at revision. See, for example, Gessen, *Sudebnaia Reforma*, pp. 142–79; B.V. Vilenskii, *Sudebnaia reforma i kontrreforma v Rossii* (Saratov, 1969), pp. 305–69; and Theodore Taranovski, "The Aborted Counter-Reform: The Murav'ev Commission and the Judicial Statutes of 1864," *Jahrbücher für Geschichte Osteuropa* 29 (1981): 161–84.
- 119 A. Sokolov, "Nedostatki v proizvodstve predvaritel'nykh sledstviï," *Iuridicheskii vestnik* 1–2 (1876): 22.
- 120 This correlation is made all the more vivid by the fact that in many of these later Cassation rulings, the judges changed their position from earlier rulings, pertaining to the status and weight of medical expertise. Later decisions include *Resh. ugol. kass. dept.* 713 (1873); 47 and 283 (1874); 199 (1875); 49 (1882).
- 121 Between 1866 and 1904, the Criminal Cassation Department issued roughly 400 rulings on questions of expertise, and in particular, medical and psychiatric. Reflecting the confusion of the early years of implementation, the overwhelming majority of the Cassation cases took place in the first decade of the reform's operation.

- 122 See Wortman, *Development of a Russian Legal Consciousness*, p. 287; and Levin-Stankevich, “Cassation,” on social background of Cassation judges. See Frieden, *Russian Physicians*, on social background on physicians.
- 123 *Resh. ugol. kass. dept.* 944 (1868) Alekseeva; 713 (1873) Kuzovleva; 47 (1874) Khisamutdinova. Many of these rights/decisions spawned from the original Protopopov ruling, which granted discretion over such matters to the court, and was cited as precedent for these later rulings.
- 124 Vladimirov, *Uchenie ob ugovolnykh dokazatel'stvakh*, p. 13.
- 125 Neiding, “O neobkhodimosti bolee tochnago raz' iasneniia”; and Bellin “Ocherk uslovii deiatel'nosti.”
- 126 See Frieden, *Russian Physicians*; and Engelstein, *Keys to Happiness*. These political objectives have been described as the means and goal which unified and shaped physicians' group identity in the later decades of the century. Besides Frieden's identification of such aims with the Pirogov Society, historian John Hutchinson has also associated this cause with the St. Petersburg Mutual Assistance Society that emerged in the 1890s and was itself an offshoot of the 1889 Pirogov Congress. In Hutchinson's words, “the society's aim was to unify physicians into a professional estate (*soslovie*) with legally recognized rights of autonomy and jurisdiction.” See John F. Hutchinson, “Politics and Medical Professionalization after 1905,” in Balzer (ed.), *Russia's Missing Middle Class*, p. 91.
- 127 *General-German Statute of Criminal Procedure*, art. 80.
- 128 Vladimirov, *Uchenie ob ugovolnykh dokazatel'stvakh*, pp. 18–19.
- 129 For an illuminating and trenchant discussion of the multiple and overlapping strata by which legal identity was formed and social groups defined and redefined in the imperial period, see Rieber, *Merchants and Entrepreneurs*, Introduction.
- 130 On the tension between these two models of governance (custodial-administrative [*Polizeistaat*] vs. abstract legal principle [*Rechtsstaat*]) see Walicki, *Legal Philosophies*, Introduction. On what “equal justice” and “proper trial” meant in the Muscovite period, see George W. Weickhardt, “Due Process and Equal Justice in the Muscovite Codes,” *Russian Review* 51 (1992): 463–80.
- 131 Khreptovich, “Po povody stat'i o sudebno-meditsinskoi ekspertize v Rossii,” *Arkhiv sud. med.* (1867): 17–20.
- 132 Physicians shared in this complaint. As Bellin put it, things were “getting better” in practice, but that which was done in practice was not sanctioned by law. Bellin also looked to Germany, where the situation was “normalized” and physicians' procedural rights were secured in law. See Bellin, “Ocherk uslovii deiatel'nosti.” For similar views on this point, see Neiding (1887), Patenko (1892), and Koni (1893). Physicians saw these rights as essential to the quality of their medical conclusions; for example, physicians wanted the right to be present in the courtroom during the entire trial (rather

- than sequestered with witnesses in a separate room) to learn which witness testimony and documents were important for them, in order to give correct conclusions.
- 133 Moreover, as we saw above, Cassation judges (also representatives of the legal camp) supported through their rulings, to a large extent, the views that physicians promoted.
  - 134 These societies are typically cited as the key forums after the reform that fostered unity among jurists engaged in different branches of the legal profession (governmental, private, and academic). The other major sites of legal organization, resulting from the reform, were councils of the bar (in cities with an appellate court), which allowed jurists to regulate their occupation's development, train new jurists, and organize legal aid for the poor. See Kuchеров, *Courts, Lawyers and Trials*, pp. 122–96; and Gessen, *Advokatura, obshchestvo i gosudarstvo. Istoriia russkoi advokatury 1864–1914* (Moscow, 1914). Juridical societies were established in Moscow in 1865, in St. Petersburg in 1877, and after the early 1870s in Ekaterinoslav, Iaroslavl, Kazan, Kharkov, Kiev, Kursk, Odessa, Tiflis, and Vladivostok. See *Iuridicheskoe obshchestvo pri Imperatorskom S.-Peterburgskom Universitete za dvadtsat' piat' let (1877–1902)* (St. Petersburg, 1902).
  - 135 See S.I. Barshev (1840) and “K voprosu o vmeniaemosti,” *Russkii vestnik* 78 (1868): 519–37. In keeping with his pre-reform views of medical expertise (discussed in Chapter 1), Barshev's call to reduce the status of the expert to “a witness like all other witnesses.” This statement was rooted in his skepticism of medical knowledge, particularly about the “human soul.” The physician's knowledge is not what gave him authority, rather, Barshev maintained that “state power gives the authority, and academic degrees—both are what give experts the ability to render ‘opinions’ on questions of science.... Because of this judges are not supposed to be critical of them?!” Barshev argued that “the physician at court is the same kind of witness like all other witnesses,” adding that “[i]t is not for nothing that the opinions of physicians are called opinions ... they do not obligate anyone.” Furthermore, he contended, “if judges are not critical of physicians' opinions,” it reduces them to a “blind weapon in the hands of physicians.”
  - 136 Koni (1893) and *Na zhiznennom puti: iz zapisok sudebnago deiatelia* (St. Petersburg, 1912), chapter 8.
  - 137 For a crude example, V.Ia. Fuks was anti-Vladimirov, anti-jury; S.I. Barshev was anti-Vladimirov, pro-jury; and A.F. Koni was pro-Vladimirov, pro-jury.
  - 138 Both Vladimirov and Koni were strong advocates for the medical-psychological study of the “individuality” (*lichnost'*) of the criminal, and by extension, the greater incorporation of these methods via physicians-experts in the judicial process. A.F. Koni, a prominent and lifelong defender of the physician as “scientific judge” illustrates this connection through his observation that “[o]ne should not, without grounds, disclaim all amendments to the

criminal process, proposed with the goal of introducing the closer and deeper study of the most important condition in each criminal case, that is, the accused himself. In this regard, the wider the investigation of the psychic [*dushevnye*] characteristics and mental condition of the person will be, the better.” For Vladimirov’s view on this, see *Psikhicheskiiia osobennosti pres-tupnikov po noveishim izsledovaniiam* (Moscow, 1877), and *Psikhologicheskoe izsledovanie v ugovnom sude* (Moscow, 1902). For Koni’s endorsement of psychiatric expertise and support of Vladimirov’s proposal to integrate medical-psychological investigation as the goal of jurisprudence, see Koni, *Sobranie sochinenii*, vol. 4 (Moscow, 1967), pp. 79–88; Koni also expressed these views in his 1893 Speech at the Fifth Pirogov Congress of Russian Physicians, and in his memoir, *Pamiat’ i vnimanie. Iz vospominanii sudebno-go deiatelia* (Peterburg, 1922). On the disciplinary development and context of this branch of medical study in Russia, see Todes, “From Radicalism to Scientific Convention.”

139 See, for example, Chechott (1875), Arsenev (1871), and Fuks (1887).

140 See Arsenev, *Sudenboe sledstvie*; and Foinitskii, *Kurs ugovnogo prava*. Another prominent defense lawyer, V.D. Spasovich, also frequently spoke out on the topic of expert status, and considered the physician a variant of the judge’s personal inspection (*lichnyi osmotr*), that is, “checkers of dubious facts.” Spasovich advanced this view in public lectures as well as in *Soch.*, t. III (St. Petersburg, 1890); t. V (1893); and t. VI (1894).

141 As Arsenev put it, “[w]e do not consider experts judges, but we do not place them at the same level as witnesses; and we propose to give to them a completely special place in the criminal process, corresponding to the role that they play in it.” He agreed that physicians should have extensive authority, but drew the line at inscribing it in law: “We wish that the opinion of experts, as people of science, enjoyed as much authority as possible; but we would like that this authority was purely moral, in order that the basis of it was its internal value, the persuasive strength of explanations given by experts, and not the numerical relationship of votes nor the persistent admonitions of the chairman.” Arsenev, *Sudenboe sledstvie*, p. 326. It should be noted that Arsenev had personal experience on which to draw when formulating his opinion; he had interacted with physician-experts while serving as a defense lawyer in the new courts. Both Foinitskii and Arsenev objected to Vladimirov’s call to make physicians’ opinions mandatory (when their conclusions were unanimous) because, in their view, that would imply a return to the pre-reform, and publicly reviled formal rules of evidence. See also Krylov, *Sudebnaia ekspertiza*, esp. chapter 4.

142 V.Ia. Fuks, “K voprosu o znachenii ekspertizy v ugovnom protsesse,” *Iuridicheskii vestnik* 9 (1887): 118–36.

143 V.Ia. Fuks, *Sud i Politsiia* (St. Petersburg, 1887).

144 V.Ia. Fuks cited in Gessen, *Sudebnaia Reforma*, p. 9.

- 145 Fuks, *Sud i Politsiia*, p. 3. Cases included Protopopov, among others.
- 146 Fuks, “K voprosu o znachenii ekspertizy,” p. 21.
- 147 Ibid., p. 21.
- 148 Fuks, *Sud i Politsiia*, pp. 131–32.
- 149 There were, however, institutional culminations to other items for which physicians also campaigned. For example in 1912, the “forensic physician” became its own distinct service post, and forensic obligations were separated from other state duties (with which they had been combined since the early eighteenth century).
- 150 Smirnov, “Prichiny neudovletvoritel’nago sostoiianiia,” p. 57.
- 151 See Bellin (1889), p. 7; Patenko (1892); Koni (1893); S. Godlevskii, “O sudebno-meditsinskoi ekspertize,” *Zhurn. iuridich. obshchestva* (1894).
- 152 This was not the first time jurists and physicians had met jointly to discuss medico-legal issues; in 1883 the juridical and psychiatric societies met in St. Petersburg and other university cities to discuss the revision of the legal definition of criminal responsibility, as part of the government’s larger project to reform the Criminal Code. The difference, however, was that these earlier joint meetings were convened at the government’s behest, and discussion contained within the confines of a government-assigned task. On these meetings to reform the definition of legal responsibility, see Feinberg, *Uchenie o vmeniaemosti* (Moscow, 1960); for the debates themselves, see A.E. Cheremshanskii, “Nesposobnost’ ko vmeneniiu, pred sudom psikhiatrov i iuristov v S.-Peterburg,” *Vestnik psikhiatr. i nevrop.* 1 (1883): 162–89. An earlier non-governmental proposal for joint medico-legal meetings, closer in kind to these 1890s efforts, was voiced in 1870. See note 72.
- 153 It is not surprising that these specialists would turn their attention to the reform of criminal-justice institutions at this point in time. Indeed crime had captured the public imagination since the 1860s, with the opening of the new courts and growth of the press that covered them; but violent crime as a social problem was real and increasing by the time these professional groups met in the 1890s. According to Sutton, this increase, however, was not the direct product of or correlated to the contemporaneous process of urbanization in the late imperial period. The majority of violent crimes took place outside of cities, and the problem of violence was clearly a rural one, he concludes unequivocally. As for the increase in criminal activity: murders, for example, more than doubled between 1874 and 1890 (when more than 3,200 persons were convicted of manslaughter and homicide); violent assault grew even more rapidly, increasing nearly fourfold between 1874 and 1894. Sutton, “Crime and Social Change,” pp. 141–64. On publicity surrounding crime stories, see McReynolds, *News under Russia’s Old Regime*.
- 154 The growing European emphasis on the hereditary causation of mental illness and antisocial behavior took its most extreme and controversial form in the works of Italian forensic psychiatrist and founder of “criminal anthro-

pology,” Cesare Lombroso. Particularly influential in the 1880s and 1890s, this school was related to and derivative from earlier deterministic doctrines, such as the idea of degeneration and the protean condition of “neuropathic weakness,” which might manifest itself in insanity, mental retardation, pauperism or criminality. According to Lombroso’s system, the born criminal (like the epileptic or insane) was an atavism, a throwback to an earlier stage of development.

155 Engelstein, *Keys to Happiness*.

156 This selective parsing of this body of ideas—and rejection of deterministic aspects that posited organic sources of crime—is evident in Russian writing on criminal anthropology. In one such exposition on criminal anthropology, the author promoted for Russia a special institution that had been put forward at a Belgian congress for criminal anthropology: a colony and clinic for criminals, standing separately from prisons and hospitals for the insane, to be under the management of psychiatrists. Yet at the same time, the author ended his article with the following social explanation of crime: “With time the value of human life and individuality will be raised, under the guarantee of social freedom [it] will escape from its oppressed situation. Then the government easily will cope with crime, as it is nothing other than a travelling companion (*sputnik*) of social evil.” P.G. Sushchinskii, “Ideia ugolovno-antropologicheskoi shkoly v nauke i sudebnom protsesse,” *Vestnik obshch. gig. i sud. i prakt. medits.* (July 1898): 547. For similar selective parsing and application of the ideas, see also E.F. Bellin, “Antropologiya i antropometriya v prilozhenii k tseliam pravosudiia” (1890). Even one of the most hard-line followers of Lombroso, V. Chizh, believed a better understanding of “human ‘*lichnost*’... serves as material for a more complete understanding of the relationship between *lichnost*’ and [social] conditions.” V. Chizh, *Kriminal’naia Antropologiya* (Odessa, 1895), esp. p. 51.

157 Bellin, “Antropologiya i antropometriia,” pp. 20–22. Bellin promoted the creation of institutes of anthropometry (physical measurement of criminals)—“applied to the goals of justice”—that would utilize the anthropometric system of the determination (and measurement) of the “*lichnost*” of the criminal. Borrowing the system from Bertillon, Bellin proposed that this system be managed by physicians; be applied to the state’s exile system for the management and identification of vagrants (*brodiazhestvo*); and replace the longstanding autocratic system of branding, which physicians had long opposed but were enlisted to participate in as part of their forensic duties. Idem, pp. 34–37. On the exile and branding system, see Schrader, *Languages of the Lash*.

158 Dril’ was a regular participant in the international congresses of criminal anthropology held in European capitals between 1885 and 1906. On Dril’’s biological perspective see D.A. Dril’, “Ocherk razvitiia ucheniia novoi pozitivnoi shkoly ugolovnogo prava,” *Iuridicheskii vestnik* 4 (1884); “Antropolo-

- gicheskaiia shkola i ee kritiki (Zametki po povodu statei g. Obninskogo),” *Iuridicheskii vestnik* 4 (1890); and *Uchenie o prestupnosti i merakh bor’by s neiu* (St. Petersburg, 1912). On the political cast of those who supported this school from a Soviet perspective, see S.S. Ostroumov, *Prestupnost’ i ee prichiny v dorevolutsionnoi Rossii*, 3rd ed. (Moscow, 1980).
- 159 Account cited in *Russkaia Meditsina* 663: 1885.
- 160 The committee members of “opponents” for Dril’s 1884 defense were Vladimirov and Danevskii from the legal faculty, and Kovalevskii and Orshanskii from the medical. Ibid. Other Kharkov forensic medical professors, Lashkevich and Anrep, as well as psychiatry professors Kovalevskii and Orshanskii, were reported to have given the most complementary comments about Dril’s book.
- 161 A.V. Pogozhev, “Vrachebnaia nauka i sudebnaia praktika,” *Doklad Moskovskomu Iuridicheskomu Obshchestvu v zasedanii 20 Ianvaria 1891 goda. Iuridicheskii vestnik* 2 (1891): 385–409.
- 162 Ibid., p. 387. Pogozhev was a longtime and avid follower of medical organizations predating the Pirogov Society, which he saw as the culmination of an era of progress. This interest was reflected in the book he wrote on the subject, A.V. Pogozhev, *Dvadsatipiatiletie estestvenno-nauchnykh s’ezdov v Rossii, 1861–1886 gg.* (Moscow, 1887).
- 163 The original quotation was made at the Second Pirogov Congress of Russian Physicians held in Moscow, 1887.
- 164 Pogozhev, “Vrachebnaia nauka i sudebnaia praktika,” p. 387.
- 165 Ibid.
- 166 Based on the discussion of these suggestions, the Moscow Juridical Society, at its 28 March meeting, decreed to establish a special commission—drawn from its members and outside physicians—to work out various forensic-medical questions: S.A. Muromtsev, D.A. Dril’, Professor of Forensic Medicine I.I. Neiding, d-r M.A. Belin, S.S. Korsakov, A.V. Pogozhev, and others. The special commission convened three times later in the year: 21 October, 4 November, and 3 December 1891.
- 167 Both V.K. Sluchevskii and I.Ia. Foinitskii participated in the 1882 governmental commission, headed by Minister of Justice V.D. Nabokov, for the reform of the preliminary investigation; these two jurists also participated in the 1893 Joint Commission of the St. Petersburg Society of Psychiatrists and Juridical Society. Another figure who embodied the personal linkages between the two issues: A.F. Koni, the most prominent and passionate advocate of medical expertise from the legal camp, was also actively engaged in governmental efforts assigned with the task of evaluating the operations of the judicial reform. One year after his 1893 speech at the Fifth Pirogov Congress of Physicians, in which he promoted a broader role for medical expertise, Koni served as chairman for a governmental commission (of senior court chairmen and procurators) to discuss the fate of the jury, during what

- Atwell calls “one of the darkest periods in the history of the Russian jury.” Atwell, “The Jury System,” p. 190.
- 168 Dril’ was invited to the St. Petersburg Joint Commission in order to “familiarize the Commission with his 1892 trip to Brussels to attend the International Criminological Congress.”
- 169 Forensic psychiatrists articulated this position in various forums, including the 1893 Joint Commission of the St. Petersburg Society of Psychiatrists and Juridical Society, which was devoted to “the question of the organization of the psychiatric study of the criminal class.” See *Doklad soedinennoi komissii s-peterburgskogo obshchestva psikhiatrov i iuridicheskogo po voprosu ob organizatsii psikhiatricheskogo izuchenii prestupnago klassa* (St. Petersburg, 1894). Participants from the psychiatric society included B.V. Tomashevskii, A.E. Cheremshanskii, and O.A. Chechott; from the legal society V.K. Sluchevskii, I.Ia. Foinitskii, and S.S. Khrulev. Ultimately, the governmental Commission for the review of the judicial reform statutes rejected the joint commission’s proposals. See *Ob’iasnitel’noi zapiske k Proektu novoi redaktsii ustava ugovovn. sudopr.*, t. I, str. 321, and for a discussion of the governmental response, see Vladimirov, *Psikhologicheskoe issledovanie v ugovovn. sude* (1901), pp. 257–62.
- 170 Sushchinskii, “Ideia ugovovno-antropologicheskoi shkoly,” p. 536.
- 171 Ibid., p. 535.
- 172 Participants included Moscow physicians such as S.S. Korsakov and I.I. Neiding.
- 173 “Voprosy vrachebnoi ekspertizy v obsuzhedenii moskovskogo iuridicheskogo obshchestva.” *Svodnyi protokol zasedanii Moskovskogo Iuridicheskogo Obshchestva 21 oktiabria 4 noiabria i 3 dekabria 1891 g.*, pp. 404–5.
- 174 Ibid.
- 175 Vladimirov’s view, similarly, maintained that the “verdicts” of physicians were the “resolution of the special question in the case.”
- 176 “Voprosy vrachebnoi ekspertizy,” pp. 409–10.
- 177 P.Ia. Rozenbakh, *Trudy V s’ezda obshchestva russkikh vrachei*, p. 57.
- 178 Similar views are also found in Sushchinskii, “Ideia ugovovno-antropologicheskoi shkoly,” p. 538. Sushchinskii proposed that psychiatric expertise functions be combined into one whole—a “medical procuracy” which independently would be given all appropriate judicial functions.
- 179 E.M. Barantsevich, *Sudebno-vrachebnaia ekspertiza v Rossii. Sudebno-vrachebnyi i bytovoi ocherk (zakon i praktika)* (Moscow, 1898).
- 180 See, for example, Wagner, *Marriage, Property, and Law*; Engelstein, *Keys to Happiness*; and Wortman, *Development of a Russian Legal Consciousness*. While contemporary Russians in the period under consideration did not use the term “rule of law,” Western historians do. One of the most useful and representative working definitions is offered by William Wagner, who employs it to mean, as contemporaries understood it, a formal legal order that



- stressed “the integrity of legal rules and procedures, wherein the regularity and predictability that resulted from the uniform observance of legal rules contributed to the security of individuals and their property.” Wagner, p. 7.
- 181 Dostoevsky’s *The Devils* first appeared in serialized form in *Russkii vestnik* from 1871–1872, and was published as a novel in 1873.
- 182 In his capacity as a journalist, N.S. Leskov covered the sensational St. Petersburg trial (1883–1885) of the murder of Sarah Becker, in which forensic psychiatric testimony figured prominently, and one of the accused was diagnosed as a “psychopath” (the first use of that medical category at a public trial). Leskov’s commentary about the case and its medico-legal aspects appeared in *Peterburgskaia Gazeta*, nos. 349, 356, 358 (1884); and nos. 250, 251, 255, 270, 272 (1885). Leskov’s short stories based on this trial include “Starinnye psikhopaty” (Old Psychopaths), *Nov’* 3/8 (1885): 626–33; and “Dremotnye vospominaniia o dele Sarry Bekker” (Drowsy Recollections of the Case of Sarra Bekker), *Nov’* 7/2 (1885): 288–95.
- 183 Tolstoy, *Resurrection* (1966 [1899]), pp. 104–7.
- 184 The fact that physicians (and medical expertise) exclusively became associated with the term *ekspertiza* is seen by the fact that even arch opponent of the medical expert, V. Fuks, used the generic, broad term “*sudebnaia ekspertiza*” (judicial expertise) to refer to medical expertise exclusively, and referred to other types—accounting, handwriting, etc.—simply by their specific names. Fuks, “K voprosu o znachenii ekspertizy”.
- 185 P. Uspenskii, “Po povodu ekspertizy v sude,” *Russkaia Meditsina* 2 (1891): 32.
- 186 Moreover, incentives that spurred physicians in other countries to simply participate as experts (much less call for an expansive role) did not apply in Russia, such as the effort to gain some of the prestige that jurists enjoyed as a high-status profession (as in early nineteenth-century France), see Goldstein, *Console and Classify*, or financial remuneration of any significance. In addition, Russian calls for the physician’s elevated and expansive status predated and were initially independent of the changing ideas about crime and deviance that emerged in the 1880s and 1890s. Only then, based on these new medical ideas, did European counterparts—particularly Italians and French—begin to call for expanding the medical expert’s role in a way that echoed the Russians, but even then it was different, as it was mainly in the context of broadly administrative alternatives that transcended the guarantees of justice embodied in classical law in the interest of “social defense.” See Robert Nye, *Crime, Madness and Politics in Modern France: The Medical Concept of National Decline* (Princeton: Princeton University Press, 1984); Ruth Harris, *Murders and Madness*; Daniel Pick, *Faces of Degeneration: A European Disorder. 1848–1918* (Cambridge: Cambridge University Press, 1989).

## CONCLUSION

- 1 Geison (ed.), *Professions and the French State*; Konrad H. Jarausch, *The Unfree Professions: German Lawyers, Teachers, and Engineers, 1900–1950* (New York: Oxford University Press, 1990); Elliot A. Krause, *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present* (New Haven and London: Yale University Press, 1996); Charles E. McClelland, *The German Experience of Professionalization: Modern Learned Professions and their Organizations from the Early Nineteenth Century to the Hitler Era* (Cambridge: Cambridge University Press, 1991).
- 2 All practicing physicians, even those not in the civil service, were regulated by the state in some capacity. The exception being those “voluntary/private” physicians who for the most part could not find a salaried position in the state service, and after the 1870s, the relatively small subgroup of *zemstvo* physicians, who, nevertheless, were still public employees, albeit at the local level.
- 3 Clowes et al., *Between Tsar and People*, p. 369.

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